

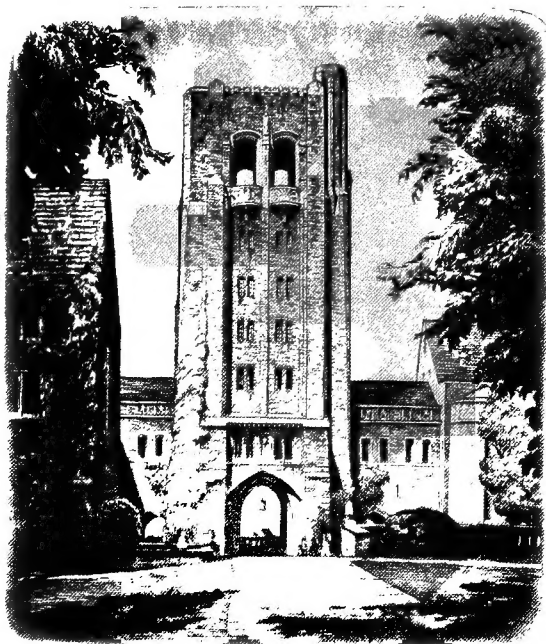
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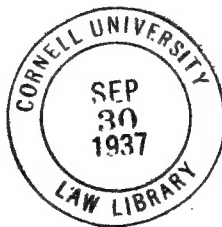
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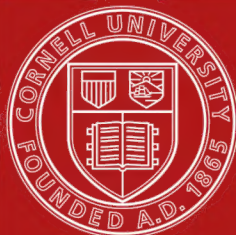


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A
SELECTION OF CASES
ON
PRIVATE CORPORATIONS.

BY
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SECOND EDITION.

IN TWO VOLUMES.

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CHAPTER XVIII.

LIABILITY OF CORPORATION FOR TORTS. RIGHT OF CORPORATION TO SUE FOR A TORT.

YARBOROUGH v. BANK OF ENGLAND.

1812. 16 *East*, 6.

THE plaintiffs declared in trover against the corporation of the Governor and Company of the Bank of *England*, for three promissory notes of the Bank of *England*, payable on demand, each for 100*l.* describing them by their dates and numbers, to which the defendants pleaded the general issue: and after a verdict for the plaintiffs before Lord *Ellenborough* Ch. J. at *Guildhall*, it was moved in the last term to arrest the judgment, on the ground that the action of trover, which was founded in tort, did not lie against a corporation: but it was at the same time explained by *Bosanquet*, who made the motion, that the objection did not originate with the Bank, who merely lent their names upon this occasion to protect the true owner of the notes, Mr. *Sidney* of *Furnival's-Inn*, who had been robbed of them on the 22d of *June* last, and had immediately given notice to the Bank to stop payment of them, under his indemnity. That the plaintiffs, who were bankers at *Doncaster*, had several months afterwards received them in the course of their business in exchange for their own notes, from a person who gave in the name of Capt. *Johnson*, but whom they did not know; and consequently all means of tracing the property were lost. And the real contest in this action was between Mr. *Sidney* and the plaintiffs; Mr. *Sidney* imputing negligence to them in the transaction.

The case was argued on *Saturday* last by *Taddy*, against the rule, and by *Garrow* and *Bosanquet*, in support of it; when the Court said that they would look into the authorities before they delivered judgment; which was now pronounced by

LORD ELLENBOROUGH, Ch. J. In this case, which was argued on *Saturday*, the only question was whether an action of trover is maintainable against a body corporate; in other words, whether a corporation can be guilty of a trespass or a tort. As a corporation they can do no act, not even affix their corporate seal to a deed, but through the instrumentality and agency of others: they cannot, as a corpora-

tion, be subject to a *capias* or *exigent*, (the process in trespass,) because the remedies which attach upon living persons cannot be applied to bodies merely politic and of an impersonal nature. But wherever they can competently do or order any act to be done on their behalf, which as by their common seal they may do, they are liable to the consequences of such act, if it be of a tortious nature, and to the prejudice of others. A corporation having the return of writs, or to which any writ, or a *mandamus*, for instance, is directed, is liable eventually to an action for a false return. The case of *Argent v. The Dean and Chapter of St. Paul's*, in this court about the year 1781, was an action for a false return to a *mandamus* respecting an election to a verger's place in that cathedral; and no objection was made that the action would not lie. *Vidian's Entries*, p. 1. is an action for a false return against the mayor and commonalty of the city of *Canterbury*, for a false return to a writ of *mandamus* to restore an alderman to his precedence of place, &c. It states the mayor and corporation as *attached* to answer, and the return as falsely and *maliciously* made. The instances of actions against corporations for false returns to writs of *mandamus*, which are so often directed to them, must be numberless, though I have not found many of them in the books of entries. *Bro. Corporations*, pl. 48. A corporation cannot be aiding to a trespass, nor give a warrant to do a *trespass without writing*; and cites 4 *Hen. VII.* 9. and certainly it appears by that case, and by the sequel of it in 4 *Hen. VII.* 16. that a corporation cannot give a command to enter into land, without deed, nor do a thing which vests or divests a freehold, nor *accept a disseisin made to their use, without deed*. But many little things, it is said, require no command; by which must be meant no special commanding, as a command to servants to chase cattle out of their lands, or to make hay: being things which it is incident to a servant to do, and which he is bound to do without command: and if he do it, it is good, and the command is not material, for he may do it without command. A corporation cannot do a *tort but by their writing under their common seal*: per *Fitzjames' Justice*; *Bro. Corporations*, pl. 34. cites 14 *Hen. VIII.* 2. 29. which imports that *by their writing* they may. A corporation may be defendants in an action of *quare impedit*, and the hindrance is an act of *tort*. *Butler v. The Bishop of Hereford and the University of Cambridge*. *Barnes, C. P.* 350. To which a multitude of other instances may be added. *Rast.* 497. *Ast.* 378. 2 *Mod. En.* 291. *Winch.* 625. 700. 721. 733. 2 *Lut.* 1100. 3 *Lev.* 332. The stat. 9 *H. IV.* c. 5. recites the practice, in assizes of novel "*disseisin and other pleas of land, of naming the mayor and bailiffs and commonalty of a franchise, as disseisors, in order to oust them of holding plea thereof; and directs the inquiry before the judges of assize, whether they be disseisors or tenants, or be named by fraud;*" which plainly proves that they may be considered as disseisors; and there are instances of trespass against corporations. In 44 *Ed.* III. 2. pl. 5. which was after 22 *Ass.* pl. 67. cited in the

argument, trespass was brought against the mayor and commonalty of *Hull* and another person; and the objection made was not that trespass would not lie against the corporation, but that as a natural person was joined with them, there must be different processes; a distress against the former, and a *capias* against the latter. But the objection does not appear to have prevailed. In 8 *H. VI.* 1. 14. trespass was brought against the mayor, bailiff, and commonalty, and one of the commonalty; and the objection was not that trespass would not lie against the corporation, but that it could not be supported against them and an individual of their body; and *Bro. Corporations*, pl. 24. says, the better opinion was that the writ was good; and 14 *Hen. VIII.* 2. says it was so awarded, and that in that case all the justices agreed to it. *Brook* also puts the case, "if mayor and commonalty disseise me, and I release to 20 or 200 of the commonalty; this will not serve the mayor and commonalty;" and the reason is because the disseisin is in their *corporate* character, and the release is to the individuals. And the case is put "that if mayor and commonalty disseise one of their own body, he shall have assize against them;" which clearly imports that the corporation, as such, might be disseisors. Also, in 4 *Hen. VII.* 13. trespass was brought against the mayor and commonalty of *York*: they justified under a right in the inhabitants to have common: but this was adjudged no plea, because the right in natural persons gave no right to the corporation, and the trespass was alleged in the corporation. They then pleaded as bailiffs in aydant: but it was adjudged that they could not be bailiffs aiding to a trespass, "nor could they give warrant *without writing* to commit a trespass; which implies that by proper writing, namely, by deed under their common seal, they might. In the present case, which is after verdict, it must be presumed that a competent conversion was proved; and if it be essential to such conversion that there should have been an authority from the company under seal to detain the notes on their behalf, that such authority was proved. The fact, by reference to my notes, is that it was admitted that the bank detained the notes in question, under an indemnity; and as no objection was taken to the terms of the admission, a competent detention, *i. e.* through the means of servants properly authorized to detain on their behalf, was thereby admitted; and therefore the presumption of due proof, after verdict, is in effect warranted by the facts of the case, if it had been material, which it by no means is, to resort to them. In the case of *The King v. John Biggs*. 3 *P. Will.* 419. it was made a question upon a special verdict in a case of capital felony, for erasing an indorsement upon a bank note, whether a person intrusted and employed by the governor and company of the bank of *England* to sign notes on their behalf, was competently authorized for that purpose, not having been, as the special verdict expressly found, so entrusted and employed *under their common seal*. There is a long and learned argument of the reporter, Mr. *Peere Williams*, in which the authorities, as to what acts a cor-

poration may do by their servant without an authority under their common seal, are drawn together. The majority of the judges who sustained the conviction must have been of opinion that an authority under their common seal was not essentially necessary for such a purpose; indeed according to the report in 1 *Stra.* 18. of the same case, the doubt of the judges must have turned upon another point, namely, upon the import of the word *endorsement*, (*i. e.* the writing alleged to be erased;) and whether it could be satisfied by an erasure of what was written on the face of the note. As to which Sir *John Strange* in his report says, "That it was held by all the judges that the defendant was guilty; for the writing on the face of the note was of the same effect as an endorsement, and being introduced by the company instead of writing on the back, and always accepted and taken to be an endorsement, was within the words of the indictment." The objection of the want of authority under the common seal, is not even noticed in the report of this case by Sir *John Strange*. However, if there would have been anything in the objection in this case, if made at the trial, there is nothing in it after verdict, when it must be presumed, as I have already stated, that all the competent proof which could be made in support of the action was made, and of course that an authority under seal for the detention of the notes was proved, if such proof were at all necessary.

Rule discharged.

MAUND v. MONMOUTHSHIRE CANAL CO.

1842. 4 *Manning & Granger*, 452.

TRESPASS for breaking and entering locks on a canal, and seizing and carrying away barges and coal.

Pleas: not guilty (by statute)¹ and payment of money into court.

At the trial, before *Cresswell J.*, at the last assizes for *Monmouthshire*, it was proved that the trespasses in question had been committed by one *Cooke*, who was the agent of the company, which was incorporated by act of parliament;¹ and that the barges and coal had been seized for tolls claimed to be due to them. The only question raised was, whether trespass would lie against a corporation aggregate for an act done by their agent within the scope of his authority. A verdict was taken for the plaintiff, damages 50*l.*, leave being reserved to move to enter a verdict for the defendants.

Talfourd Serjt. in last term, obtained a rule nisi accordingly, or to arrest the judgment. He cited the case of *Sutton's Hospital*,² *Anon.*,³ *Morgan v. The Corporators of Carmarthen*,⁴ *Thusfeld and Jones's*

¹ 36 *G. 3. c. cii.*

³ 12 *Mod.* 559.

² 10 *Co. Rep.* 32.

⁴ 3 *Keb.* 350.

case,¹ *Com. Dig. tit. Franchises* (F. 19.), 6 *Vin. Abr. tit. Corporations* (B. a.).

Ludlow, Serjt. now shewed cause. The act of parliament by which the company is incorporated provides that they may sue and be sued: it also empowers them to enter on lands. If they enter improperly, it would seem, that they may be sued for the trespass. The whole doctrine that a corporation cannot be sued in trespass rests on one passage in *Bro. Abr. Corporations*, 43; ² where the reason given is, that neither *capias* nor *exigent* can go against them. A *distringas*, however, may be issued against a corporation. It has been decided that trover will lie against a corporation; *Yarborough v. The Bank of England*; ³ where Lord *Ellenborough* C. J., in giving the judgment of the court, reviews all the authorities upon the subject. [*Tindal* C. J. That case was after verdict. It was a motion in arrest of judgment: no leave appears to have been reserved.] But the broad doctrine is laid down that trover would lie; and there is no difference in principle between that action and trespass. The payment into court in this case admits that the action is rightly brought. An indictment will lie against a corporation, although all the ordinary consequences cannot follow.⁴ Various

¹ *Skin*. 27.

² “*Nota, per Thorpe*, that trespass lies not against commonalties, to wit, by the name of corporation, but against the persons who did it, by their proper names; for neither *capias* nor *exigent* lies against a commonalty; nor shall a commonalty implead or be impleaded but with the mayor or bailiffs, if they have mayor or bailiffs; and there by him (*i. e.* according to *Thorpe*) there may be a corporation by name of a commonalty, without mayor, bailiff, or other head.” Citing 22 *Ass. p. 67.* (22 *Ass. fo. 100. pl. 67.*)

In *Bro. Trespass*, pl. 239., Lord *Brooke* abridges the same case thus: “*Nota, per Thorpe*, that trespass lies not against a commonalty, but shall be brought against the persons by their own names; for neither *capias* nor *exigent* lies against a commonalty.”

In the Book of Assizes, the case is thus reported at large: —

“*Nota, by Thorpe.*” (Chief Justice of the King’s Bench), “that a writ of trespass lies not against a commonalty; but it is necessary in such writs that the persons be named in certain; for he said that a man shall never have a *capias* or *exigent* against a commonalty; *et hoc patet* in a bill of trespass brought by *J. A. W.* against certain persons and the commonalty of the town of *J.* Also he said that the commonalty of any town shall never be named in any action, defendant or plaintiff, unless the mayor or bailiff be named, if there be a mayor or bailiff, &c., and if there be no mayor or bailiff, then the commonalty may be solely named, &c.”

In the case of *The Mayor, Sheriffs, and Commonalty of Norwich*, *M. 21 E. 4, fo. 12, pl. 4.*, *Catesby J.* (fo. 14.) says, “It cannot be denied that the mayor, sheriffs, and commonalty are one entire body, which cannot be severed, and which cannot do any corporal wrong.” But a writ of trespass for disturbance in taking the profits of liberties against a corporation (sued jointly with an individual) was held to be maintainable; *Archbishop of York v. Mayor and Commonalty of Hull and Another*, *H. 45 E. 3, fo. 2, pl. 5.* So, for disturbance in holding a court-leet; *Prior of Merton v. Mayor of New Windsor and Others, Burgesses of the said Town*, *T. 18 H. 6, fo. 11, pl. 1.*

And see *The Mayor and Commonalty of Winchester’s case*, 31 *Ass. fo. 188, pl. 19.*; *M. 8 H. 6, fo. 1, pl. 2.*; *M. 9 H. 6, fo. 36, pl. 9.*; *Great Yarmouth case*, *M. 20 H. 6 fo. 9, pl. 19.*; *Kedwelly’s case*, *M. 15 E. 4, fo. 2, pl. 2.*; *T. 4 H. 7, fo. 13, pl. 11.*

³ 16 *East*, 6.

⁴ See 1 *Kyd, Corp.* 225.

instances are collected in *Kyd on Corporations*,¹ where trespass has been brought against a corporation.² Other authorities are mentioned in 1 *Wms. Saund.* 340. n. The principle that a corporation is liable in tort for the tortious act of its agent, done in its ordinary service, is further carried out in *Smith v. The Birmingham Gas Company*.³ [*Tindal* C. J. The process is the same both in case and in trespass — namely, by attachment, distress, capias and outlawry. If case will lie, it is difficult to see why trespass should not lie also.]

Talfourd Serjt. was then called upon to support the rule, and admitted that he had nothing to rely upon but the old authorities: and that in *Regina v. The Birmingham and Gloucester Railway Company*,⁴ the court of Queen's Bench had, in this term, refused to quash an indictment against a corporation. The doctrine in *Bro. Abr.*, however, is imported into *Com. Dig. tit. Franchises* (F. 19.).⁵

TINDAL C. J. The process in case and trespass being the same; it is impossible to see any distinction between the two actions.

Per curiam.

Rule discharged.

CHESTNUT HILL, &c. TURNPIKE CO. v. RUTTER.

1818. 4 *Sergeant & Rawle* (Pa.), 6.

IN ERROR.

This was an action of trespass on the case [brought by Rutter against the Turnpike Co.], in the Common Pleas of *Montgomery* county, for stopping a water course.

¹ Vol. i. pp. 223–225.

² The author nevertheless draws this conclusion: — “Notwithstanding these examples, however, it may well be doubted whether, at this day, such an action could be maintained against a corporation aggregate; the action supposes a *personal* act, of which the corporation is incapable in its collective capacity: the act therefore, which is the foundation of the action, must be done by some individual in order to assert the right of the corporation, and the action being brought against that individual, will answer the purpose of bringing the right to a judicial determination.

“It is accordingly decided that a *replevin* cannot be maintained against a corporation aggregate, because it is founded on a distress, which the corporation cannot take but by its bailiff.” Citing *Brownl.* 175., *Bac. Abr. tit. Corporations*, (E. 2.)

³ 1 *A. & E.* 526.

⁴ Since reported, 2 *Q. B. Rep.* 47., 1 *G. & D.* 457., 2 *G. & D.* 236.

⁵ Where it is also said that “process of outlawry does not lie against a corporation aggregate; 45 *E.* 3. 2, 3. (The reference is to *The Archbishop of York v. Mayor and Commonalty of Hull and Another*, *H.* 45 *E.* 3. fo. 2, pl. 5.) *antè*, 454. n., nor a subpoena; for it has no conscience, *D.* 2 *Bul.* 233.” (The reference is to *The Company of Shipwrights of Reddiffe's* case.)

It is observable, that the dictum of *Thorpe* C. J. in the Book of Assizes, does not, in terms, apply to all corporations aggregate, as such, but to municipal corporations only.

The declaration stated, that the defendants below, the plaintiffs in error, were incorporated by an act of assembly, passed on the 5th day of *March*, 1804, entitled, "an act to enable the Governor of this Commonwealth, to incorporate a company to make an artificial road, from the top of *Chestnut Hill*, through *Flourtown*, to the *Spring House* tavern, in *Montgomery* county;" that the plaintiff was seised of a messuage, tanyard, and tract of land, through which a rivulet from time immemorial, had flowed, &c.; and that the defendants *contriving, and wrongfully, and injuriously intending to injure* the said plaintiff, and to deprive him of the benefit of working and tanning leather, in the said tanyard, and of the profit that might accrue therefrom, *did wrongfully and unjustly erect and set up, certain jetties or piers*, on each side of the said rivulet, by reason whereof, the said rivulet was thrown back, and overflowed the said tanyard, and destroyed a great quantity of hides, &c.

By the 9th section of the act of incorporation,¹ the company had power "to erect permanent bridges over all the waters crossing the said road."

The jury found a verdict in favour of the plaintiff, for 305 dollars.

The errors now assigned were, 1. That the Court below permitted an action to be maintained against a body corporate for a tort.

2. That the declaration, if such an action could be maintained, set forth no cause of action.

E. Ingersoll and Ingersoll, for plaintiffs in error.

[After discussing the history of actions:]

It was never, however, pretended, that an action of trespass *vi et armis*, would lie against a corporation, which, from its nature, is incapable of committing a tort; nor can the same thing in effect be done, by changing the form of action, and calling it an action on the case. Corporations can no more be guilty of torts than executors; the analogy between them, in this respect, is strong, and it has been decided, that trover does not lie against an executor for a conversion by his testator. *Hambly v. Trott*.² Indeed, it was once doubted, whether *assumpsit* would lie against a corporate body, because it could make no promise without affixing its seal, and the Supreme Court of this State, went so far on one occasion as to decide, that it would not. *Breckbill v. Turnpike Company*.³ The remedy for a tort is not against the corporation, but against the individual who commits it, who may have his action over against those who employed him. The relation of master and servant, as it exists between individuals, does not hold between corporations and those who act under their orders. *Kyd on Corp.* 223, 260, 450. If the servant of a corporation commit an assault and battery, it will not be pretended, that the corporation is responsible. If it be not responsible for an assault

¹ Pamph. L. 215.

² Cowp. 372.

³ 3 Dall. 496.

and battery committed by its servant, the relation of master and servant does not exist; because nothing is more clear than that a master is responsible for the torts of his servant, committed in the course of his master's business. How can a distinction be drawn between an assault and battery, and injuries of the nature of that complained of in this suit? It is impossible to say where the line should be placed.

Corporations are the creatures of the law, of a highly refined and intangible nature, whose properties and attributes, lawyers alone can understand. Deriving their existence from the law, they must be governed by the terms of the law which creates them. They must proceed and be pursued in the path prescribed by the law. If the corporators do an act, beyond their corporate powers, they, as individuals, and not the corporation of which they are members, must answer it. If the corporation itself enter into a contract not authorised by its charter, no action founded on the contract can be sustained, though the individual members may be sued. Suppose an insurance company should undertake to make a turnpike road, or to build a church, could those who were employed by them, recover against the corporation as such? Every principle of the law of corporations forbids it. Now, a corporation never was and never can be authorised by law to commit a tort; they can invest no one with power for that purpose. If, therefore, an agent constituted for a legal purpose, inflict an injury, the corporation is no more answerable, than it would be for an act of that agent, done without any authority whatever derived from it, because being unauthorised to commit a wrong, it is out of the scope of its corporate powers. The act of the law, like the act of God, can work a wrong to no one, and if a man sustain damage by it, it is *damnum absque injuria*. The plaintiff in this case, therefore, must look to the individual from whose acts he sustained an injury, who never was, and never could be authorised to commit a tort. The principle that a body corporate can only act in strict pursuance of the objects of its incorporation, is stated and exemplified in the conclusion of the Lord Chancellor's opinion, in the case of *Child v. Hudson's Bay Company*.¹ It is also established by the cases of *Beatty v. Marine Insurance Company*,² and *Head v. Providence Insurance Company*,³ *Steele v. President &c. of Lock Navigation*,⁴ *M'Clennahan v. Curwen*.⁵

Between *nonfeasance* and *malfeasance*, a marked distinction exists. It is not denied, that for *nonfeasance*, actions of trespass on the case have been sustained, as in the case of the *Mayor of Lynn (in error) v. Turner*,⁶ where the action was against the corporation of *Lynn Regis*, for neglect of duty, in not keeping a creek in repair; in the case of *Townsend v. Susquehannah Company*,⁷ for neglecting to repair a

¹ 2 P. Wms. 209.² 2 Johns. 114.³ 2 Cranch, 166.⁴ 2 Johns. 283.⁵ 6 Binn. 509.⁶ Cowp. 86.⁷ 6 Johns. 90.

bridge, and in several similar cases. *Gray v. Portland Bank*,¹ *Stephens v. Middleton Canal*.² In *Riddle v. Proprietors of locks and canals on the Merrimac*,³ PARSONS C. J. lays down the law more broadly than by his authorities he is warranted in doing, yet he does not go so far as to assert the general proposition, that trespass will lie against a corporation. He merely says, that in *certain* cases, trespass may be maintained; and it is to be observed, that the action in which the opinion was delivered, was for a *nonfeasance*; a neglect of a corporate duty in not keeping the canal in order.

On recurring to ancient authorities, it will appear, that trespass against a corporation for a *tort*, has never been sustained. THORPE J. in the *Book of Assizes*, 22 *Edw.* 3. p. 100. expressly says, that trespass never lies against a corporation. A corporation and an individual cannot be joined in trespass as defendants. 8 *H.* 6. 1. *pl.* 2. A corporation cannot commit a disseisin except for its own use. *Mich.* 8 *H.* 6. *pl.* 34. p. 14. *Mich.* 9. *H.* 6. *pl.* 9. p. 36. *Hil.* 22. *H.* 6. *pl.* 36. p. 46. Trespass does not lie against a corporation in its corporate name. *Vin. Corp.* *pl.* 15. p. 300. Nor will an attachment lie. *Id.* *B.* *A.* *pl.* 3. p. 311. Nor replevin. *Id.* *X.* *pl.* 17. p. 308. In trespass against an abbot he shall be named by his name of baptism. *Id.* *Q.* *pl.* 9. p. 300. An action for a false return to a *mandamus*, must be against the individual members of the corporation. *Id.* *Q.* *pl.* 50. p. 303. A corporation cannot beat or be beaten. *Id.* *Z.* *pl.* 2. p. 309. If a corporation disseise, it is in their natural and not in their corporate capacity. *Bac. Ab. Corp.* *E.* *pl.* 5. Trespass does not lie against a corporation. *Com. Dig. Plead.* 2. *B.* p. 196.

2. If the plaintiffs in error, be capable of inflicting the injury imputed to them, the declaration sets forth no cause of action.

[The argument on this point is omitted.]

Binney, for the defendant in error. This case presents three questions. 1. Whether a corporation can commit a tort? 2. Whether, if it can, this is the proper form of action? 3. Whether the cause of action is well set forth?

It must now be taken as proved, that the company gave authority to their servants to do the act complained of. The rule between corporations and their servants, is substantially the same, as between individuals and their servants. If, therefore, they give their servants power to do an act in pursuance of their corporate character, and they do it improperly, the corporation are responsible in the same manner as any other master. Why should a difference exist, and why should a corporate body be protected in the commission of wrong? If a corporation be the intangible being it is asserted to be, a greater and more mischievous monster cannot be imagined. According to the doctrine contended for, if they do an act within the scope of their corporate powers, it is legal, and they are not answerable for the con-

¹ 3 Mass. R. 364.

² 12 Mass. R. 466.

³ 7 Mass. R. 169.

sequences. If the act be not within the range of their legitimate powers, they had no right by law to do it; it was not one of the objects for which they were incorporated, and, therefore, it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any Court of justice. The master is responsible for the acts of the servant, not because he has given him an authority to do an illegal act, but from the relation subsisting between them. If the servant exceed the power he has received, the master must answer it. So if the company give their servant authority to make a road, in pursuance of their power to do so, and he exceed that authority, they are answerable, because he is their servant. The rule which makes the master responsible for the acts of the servant, is declared by SEDGWICK J. in delivering the opinion of the Court, in the case of *Gray v. Portland Bank*,¹ to apply with peculiar force to corporations and their agents. The position that a corporation can do no wrong, is pernicious in its consequences, and unfounded in law. If I put a note in bank, and wish to get it out, to put it in suit, and the bank refuse to deliver it, surely the remedy is an action of trover. If I refuse an exorbitant toll, in consequence of which, my horse is taken from me, and I cannot get him from the toll gatherer, can it be doubted, that I may have an action of trover against the company? If I cannot look to the company, there is no remedy, because the toll gatherer may be worth nothing, or may have gone off; nor can the individual members be resorted to unless they were guilty of malice. If a quagmire or any other nuisance exist, the supervisors where there is no turnpike company may be indicted; and where a company are invested with the duties of supervisors, they may be indicted. The corporators as individuals cannot be indicted, because it is not within the line of their duty as such.

As to the form of action, it is difficult to point out any other remedy for injuries of this description than trespass on the case, and if there be no other remedy, this is the right one. *Assumpsit* certainly would not lie, because there was no contract; nor would trespass *vi et armis*, because the damage was consequential. The old authorities which have been referred to, belong to a period, when the English lawyers were more distinguished for subtlety than for sound sense; and when the nature of corporations was greatly refined upon. It appears, however, from 2 *Inst.* 697. 703, that a corporation was then considered as substantially an inhabitant or occupier; and subsequently in *Rex v. Gardener*,² it was held, that a corporation seised of land for their own profit in fee, are, within the statute of 43 *El. c. 2*, inhabitants or occupiers of such lands, and liable in respect thereof, to be rated in their corporate capacity to the poor. In the Supreme Court of the *United States*, it has been decided, that a corporation may sue in the Circuit Court of the *United States* as a citizen. *Deveau v. Bank of*

¹ 2 Mass. R. 385.

² Cowp. 79.

United States.¹ The law on the subject of corporations has of late been greatly and beneficially altered. It was formerly held, that they could do nothing except under their seal, and for that reason *assumpsit* would not lie against them. All these niceties, however, are now repudiated, and they may enter into contracts either express or implied, without seal. When a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorised agents, are *express* promises by the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise *implied* promises, on which an action lies. *Bank of Columbia v. Patterson's administrators*.²

The opinion of THORPE J. which is much relied on, was nothing more than a *dictum*, and was grounded upon the necessity which then existed of a *capiatur pro fine* and *exigent*, which could not be entered against a corporation. These, however, are now exploded, and giving to the assertion of THORPE, all the weight to which it can possibly be entitled, the authority must fail, because the reason of it no longer exists. The distinction taken between a *misfeasance* and a *nonfeasance* is altogether ideal; it has no solid foundation. The authorities all shew, that the action will lie in either case. If a company be guilty of a *tort* by neglecting a road or bridge, how can they be reached but in this form of action? That this is the proper form, is proved by the cases adduced on the opposite side. The *Mayor of Lynn v. Turner*, was clearly an action of trespass on the case, for a *tort*; so was *Townsend v. Susquehanna Turnpike Company*, and *Riddle v. Proprietors of Locks, &c. on Merrimack*. In two of these cases the point was not made, and in the third, it was overruled. As respects the form of action, there is no difference between *nonfeasance* and *misfeasance*; trespass on the case, is the general form. We are, therefore, brought back to the point from which we set out, whether a corporation can commit a *misfeasance*, which is clearly proved, not only by the late, but by the ancient authorities, and even by some of those which have been cited for the plaintiffs in error. *Trespass against the Mayor and Commonalty of York*; plea that all the inhabitants had right of common, in the place where the trespass, &c.; not good, because the action is against the corporation, and the plea is a justification as to individuals. Plea altered, and the corporation said to be aiding in the trespass; adjudged that they cannot be aiding, *nor can they give a warrant to commit a trespass without writing*. 4 H. 7. pl. 11. p. 13. A corporation cannot authorise a wrong to be committed, *except by writing under their common seal*. *Brook Corp.* pl. 34. p. 189. These authorities prove the *capacity* of a corporate body to commit a wrong, and shew the position said to have been laid down by THORPE, to be erroneous. *Trespass against the Mayor, Bailiffs, and Commonalty of Ipswich, and one Jabez*. Objection was taken, that a

¹ 5 Cranch, 65.² 7 Cranch, 299.

corporation and an individual cannot be joined in one writ, but no objection taken, to trespass having been brought against a corporation. 8 H. 6. pl. 2. p. 1. *Id.* pl. 34. p. 14. An assize of *novel disseisin* was maintained against the mayor and commonalty of *Winton*. *Lib. Ass.* 31. *Ass.* pl. 19. In trespass against a corporation, if defendant plead a *misnomer*, plaintiff may reply, known by one name or the other. 6 *Vin. pl.* 42. p. 303. The result of these authorities is, that even in ancient times, trespass could be sustained against a body corporate.

[Omitting argument as to sufficiency of declaration.]

TILGHMAN C. J. This is an action on the case, brought by *James Rutter* against *The Chestnut Hill & Spring House Turnpike Company*, for an injury done to the plaintiff's land and tanyard, in consequence of certain piers erected by the defendants, on each side of a stream of water, by which the stream was obstructed and thrown back, and overflowed the plaintiff's land.

The defendants below, who are plaintiffs in error, rely on two objections. 1. That a corporation is not suable in this kind of action. 2. That the declaration does not state a good cause of action, even if the defendants were liable to an action in this form.

1. Corporations have lately been so multiplied in the *United States*, that they stand a very prominent part, in the business of the country. It has, therefore, been necessary to consider with great attention, their nature, and their rights, both as to suing and being sued. And as it would be extremely inconvenient, that they should do wrong without being amenable to justice, the inclination of the Court has been to hold them responsible. There was a time, when it seems to have been supposed, that they could make no contract, but by writing under their common seal. The reason assigned was, that being incorporeal, and consequently incapable of speaking, it was impossible that they should enter into a parol contract. But upon reflection, this reason has been thought insufficient; for if pursued to its full extent, it would prove, that a corporation could not act at all. It has no hand to affix a seal, and must therefore employ an agent for the purpose. But this agent must receive his authority previous to his affixing the seal. It is necessary, therefore, that the corporation should have the power to act without seal, so far as respects the appointment of a person to affix the seal. Now if it can appoint an agent without seal, for one purpose, there is no reason why it may not for another. Accordingly, in the case of *The King v. Biggs*, 3 P. Wms. 419, on a special verdict in a case of capital felony, it was held, that the *Bank of England* might without seal, authorise a person to sign notes in its behalf. And it was decided by the Supreme Court of the *United States*, in the case of *The Bank of Columbia v. Patterson's administrators*, 7 Cranch, 299, that a corporation may, without seal, enter into a contract, express, or even implied. In the words of Judge STORR, by whom the opinion of the Court was delivered, "when a corporation is acting within the

scope of the legitimate purpose of its institution, all parol contracts made by its authorised agents, are *express* promises of the corporation, and all duties imposed on them by law, and all benefits conferred, at their request, raise *implied* promises, for which an action lies." By this decision, I consider the law as settled. It does, indeed, seem to have been the opinion of *this Court*, in the case of *Breckbill v. The Lancaster Turnpike Company*, 3 *Dall.* 496, that an action of *assumpsit* would not lie against a corporation. But the law had not been at that time fully considered, and I may say, that our late brother YEATES, who was on the bench when *Breckbill v. The Lancaster Turnpike Company* was decided, was satisfied as to the propriety of acquiescing in the authority of *The Bank of Columbia v. Patterson's administrators*.

But it is objected that the present action is not on *contract* but on *tort*, and a very refined argument is brought forward, to prove that a corporation cannot be guilty of a tort. A corporation, say the defendant's counsel, is a mere creature of law, and can act only as authorised by its charter. But the charter does not authorise it to do wrong, and therefore it can do no wrong. The argument is fallacious in its principles, and mischievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company may do great injury, by means of labourers who have no property to answer the damages recovered against them. It is much more reasonable to say, that when a corporation is authorised by law to make a road, if any injury is done in the course of making that road by the persons employed under its authority, it shall be responsible, in the same manner that an individual is responsible for the actions of his servants, touching his business. The act of the agent is the act of the principal. There is no solid ground for a distinction between contracts and torts. Indeed, with respect to torts, the opinion of the Courts seems to have been more uniform than with respect to contracts. For it may be shewn, that from the earliest times to the present, corporations have been held liable for torts. Many cases have been cited from the year books. Upon examination, they do not all answer the citations, but enough appears to shew that the law was so understood. In 4 *Hen.* 7. p. 13. *pl.* 11, we find an action of trespass against the Mayor and Commonalty of *York*. Plea, that all the inhabitants had a right of common in the land where the trespass is supposed to have been committed: *held*, not good, because the action is against the *corporation*, and the plea is a justification as to *individuals*. In a subsequent part of this case, it is said that a corporation cannot give a warrant to commit a trespass *without writing*. This, if it be law, proves that a warrant may be given by writing, which is sufficient for the plaintiff's purpose, the point being, whether a corporation can commit a trespass. In 8 *Hen.* 6. p. 1. *pl.* 11. and p. 14. *pl.* 34, trespass was brought against the Mayor and Bailiffs, and Commonalty of *Ipswich*, and one *J. Jabez*. It was objected, that a corporation and an

individual cannot be joined in one action ; but it was not objected that trespass does not lie against a corporation ; and the objection is said to have been overruled in 14 *Hen.* 8. 2. In the book of assises (31. *Ass. pl.* 19.) it appears that an assise of novel disseisin was maintained against the Mayor and Commonalty of *Winton*. *Brook* lays it down, that if the Mayor and Commonalty disseise one who releases to several *individuals* of the corporation, this will not serve the Mayor and Commonalty, because the disseisin is in their *corporate* capacity. In the old books of entries are numerous precedents of writs of *quære impedit* against corporations, and in *Vidian's Ent.* 1. is a declaration in an action on the case (16 *Car.* 2.), against the Mayor and Commonalty of the city of *Canterbury*, for a false return to a *mandamus*. To come to more modern times, it was held in the Mayor of *Lynn, &c.* (in error,) v. *Turner*, (*Coup.* 86,) that an action on the case lies against a corporation for not cleansing, and keeping in repair, a stream of navigable water, which it was bound to do by prescription, in consequence of which the plaintiff was injured. This was in the year 1774, a little before our revolution. The laws of the Commonwealth forbid my tracing this point through the English Courts, since the revolution, but we shall find abundant authority in the Courts of our own country. In *Gray v. The Portland Bank*, 6 *Mass. Rep.* 364, it is laid down, that the bank was responsible for wrongs done by itself or its agents. In *Riddle v. The Proprietors of the Locks, &c. on Merrimack river.* 7 *Mass. Rep.* 169, an action was maintained against the company for damage suffered by the plaintiff in consequence of the locks not being kept in repair. And in *Townsend v. The Susquehanna Turnpike Company* (6 *Johns.* 91,) an action was supported for the loss of a horse, killed by the falling of a bridge, which the company had built of bad materials. These authorities put it beyond doubt, that the form of action, in the present case, is good.

The objection to the declaration remains to be considered. It is said, that the act of assembly, by which this company is chartered, gives them power to erect bridges over all the streams which cross the road, and, therefore, they are not responsible for any damages which may be suffered in consequence of these bridges. But this is too broad a proposition : for, granting that they would not be responsible for damages unavoidably resulting from a bridge built in the best manner, and obstructing the passage of the water, no more than was necessary for its proper construction, it would not follow that they should not be answerable for damages arising from a bridge so carelessly or inartificially built, as to occasion an unnecessary and wanton obstruction. Now, the declaration alleges, that the defendants contriving, and wrongfully and injuriously intending to injure the plaintiff, &c. *did wrongfully and unjustly set up certain piers, &c.* So that we are bound, after verdict, to suppose that it was proved the defendants were in fault, in the manner of erecting the piers. To say, now, that they were guilty of no wrong, would be to declare that it is impossible for

them to be made answerable for *any injury which may arise from any kind of bridge or piers*. This is going farther than I can permit myself to do, being satisfied that the law never intended to authorise damage without necessity. Whether the company would be answerable for damages occasioned by a bridge or piers, of proper construction, is a point of great importance, on which I give no opinion, as it does not arise in this case. I am of opinion, on the whole, that the judgment should be affirmed.

Judgment affirmed.

CHILDS v. BANK OF THE STATE OF MISSOURI.

1852. 17 *Missouri*, 213.

CHILDS brought an action under the new code, alleging that the defendant had falsely accused, and caused him to be accused of embezzlement, and upon this charge had unjustly and maliciously, and without probable cause, caused him to be arrested and imprisoned; that under color of a search warrant, the defendant had obtained possession of certain valuable papers and evidences of debt belonging to the plaintiff; that the defendant had caused the dwelling house of plaintiff to be beset by armed men by day and by night, thus restraining the plaintiff and his family of their liberty, and interrupting their intercourse with their friends; and that the defendant had falsely and maliciously caused the plaintiff to be indicted and prosecuted; for all which grievances, the plaintiff claimed damages to the amount of fifty thousand dollars.

A demurrer to this petition was sustained, and the cause is brought to this court by writ of error.

Edward Bates, for plaintiff in error. The bank, as a corporation, was legally capable of doing all the wrongs charged in the petition; but if capable of doing any one of them, it was erroneous to sustain the demurrer. Our statute law puts corporations and private persons on the same footing. R. C. 1845, ch. 101, § 10. Our statute of set-off is not restrained to natural persons. *City of St. Louis v. Rogers*, 7 Mo. R. 19. The federal courts consider corporations as the mere aggregate of the individual members, and take or refuse jurisdiction accordingly. *Hope Insurance Co. v. Boardman*, 5 Cranch, 57. *Bank v. Deveaux*, ib. 61. *Bank U. S. v. Planters' Bank*, 9 Wheat. 904. *Kirkpatrick v. White*, 4 Wash. C. C. R. 595. A money corporation may commit a trespass, and it is sufficient to charge the corporation as a trespasser, that its president ordered the sheriff to execute a writ. *Ford v. Perpetual Insurance Co.*, 11 Mo. Rep. 295. In the nature of things, corporations are as capable of doing wrongful acts, as private persons are, and justice requires that they should be held responsible for them in the same way; and this is the settled doctrine of the com-

mon law. *Yarborough v. Bank of England*, 16 East, 6. *Parsons v. Loyd*, 3 Wilson's Rep. *Goodloe v. Cincinnati*, 4 Ohio, 513. 4 S. & R. 6. Angell & Ames on Corporations, (3d ed.) 385, § 7, and especially p. 391.

Miron Leslie, for defendant in error. It is physically and legally impossible that a corporation, as such, can maliciously prosecute, or wilfully slander any one. Kyd on Corporations. Bacon's Ab. 4 Serg. & R. 6. 16 East, 6. 20 Maine Rep.

RYLAND, Judge, delivered the opinion of the court.

1. The difficulty under which we have labored in this case, was to classify the action. It is brought under the new code. If it were an action of slander, we should at once say that it could not be maintained. The bank is a corporation — it cannot utter words — it has no tongue — no hands to commit an assault and battery with — no mind, heart or soul to be put into motion by malice; therefore, if it was an action for an assault and battery, or for a malicious prosecution, or for slander, we should at once say, that such could not be maintained. Yet the doctrine is well settled that corporations are now liable for torts, in some cases, in the same manner as persons individually are. The bank of England has been sued in trover and the action sustained. Many corporations have been sued for the misfeasance or malfeasance or negligence of their servants or agents. Yet I have not been able to find where a public or private corporation was sued, either for slander, malicious prosecution, false imprisonment or for assault and battery, and the action held maintainable. In the nature of things, manifest injustice might follow from allowing such actions. In such corporations, the majority of the incorporators rule and manage the affairs, appoint agents, officers and servants, and direct their conduct.

Suppose the majority of directors of a bank should, by a vote, order one of its servants to strike a man, or to have a man accused of larceny, and have him arrested and imprisoned; these acts were ordered to be done by a majority, against the votes and wishes of the minority. Now let the corporation be held liable to be sued as such, and the innocent must suffer with the guilty, the non-offending with those directing and ordering the injury. This cannot be. In 20 Maine Rep. 43, *State v. Great Works Milling and Manufacturing Co.*, it is said by Chief Justice Weston, "a corporation is created by law for certain beneficial purposes. They can neither commit a crime or misdemeanor by any positive or affirmative act, or incite others to do so as a corporation. It is a doctrine in conformity with the demands of justice and a proper distinction between the innocent and the guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business and not the corporation should be indicted." In 1 Ohio Rep. 28, *Orr v. Bank of United States and others*, one of the questions was, "whether a corporation aggregate is liable to be sued by its corporate name, in an action of trespass for an assault and battery and false imprisonment." In this case, Judge Burnet delivered the

opinion of the court. He reviewed the cases from the earliest reporters, Thorp's opinion in 22 Ass. 67, down to 12 Johns. 227; 14 Johns. 118; 7 Mass. 169; 16 East, *Yarborough v. Bank of England*; 7 Cranch, 299; and concludes on this point thus: "On the whole, whatever exceptions may exist to the rule, that actions of trespass generally do not lie against corporations, it is evident that the action now under consideration cannot be one of the exceptions, and therefore that it cannot be sustained against the bank."

"An action for an assault and battery committed on a corporation aggregate in their corporate character, would be a novelty in judicial proceedings; and yet it appears to be as contrary to reason and common sense, that they should be the agents in such a trespass, as it is that they should be the objects of it." Malicious prosecution—false imprisonment—slander, must all come within the principles of these decisions. The persons doing the deed are liable individually, not the corporation. We therefore think in this action, that the court below properly sustained the demurrer.

[The court then intimated that, although, under the new code, a plaintiff may unite in his petition as many causes of action as he may have, yet each cause should be distinctly and separately stated. The opinion concludes as follows:]

Upon the whole of the matter set forth in the petition, it is to be seen, that if such things did take place as therein charged against the bank, its servants or agents or officers may be responsible to the persons injured, and against such the law affords a remedy.

The judgment below should, then, be affirmed, and such being the opinion of Judge Scott, (Judge Gamble not sitting in this cause,) it is affirmed accordingly.

EASTERN COUNTIES RAILWAY CO. v. BROOM.

1851. 6 *Exchequer*, 314.¹

IN the Exchequer Chamber. Error on a bill of exceptions. Broom sued the Railway Company and one Richardson in trespass for assault and imprisonment. There was a verdict for plaintiff. One question argued on the bill of exceptions was, whether an action of trespass for assault and battery will lie against a corporation aggregate. The alleged assault and imprisonment were the acts of one Richardson, a servant of the Railroad Company, committed in the course of his attempt to enforce certain by-laws of the Company relative to passengers' delivering up tickets and paying fares.

¹ Only so much of the case is given as relates to one point; and the statement as to that point is abridged. — Ed.

Willes, for plaintiff, in error.

First, trespass for assault and battery does not lie. This objection is open to the plaintiffs in error in arrest of judgment, as it arises on the pleadings. It may be admitted, that in some cases trespass lies against a corporation aggregate; as, for instance, trespass for taking goods, but there the matter falls within the original scope of their powers: *Maund v. Monmouthshire Canal Company*, 4 M. & Gr. 452.¹ For a corporation has authority to deal with property. But it cannot be said that the commission of a tort by a trespass to the person falls within their duties. In 1 Blac. Com. 476, it is said, that a corporation "can neither maintain nor be made defendant to an action of battery or such like personal injuries; for a corporation can neither beat nor be beaten in its body politic;" and reference is made to Br. Abr. tit. "Corporation," 63. So in Vin. Abr. tit. "Corporations" (P.) 2, it is laid down, that "trespass does not lie against commonalty, but shall be brought against the persons by their proper names;" and it is also stated in the same work, that "a corporation cannot be beaten in their corporate but in their natural body; nor a corporation cannot beat another, nor do treason or felony in their corporation:" Vin. Abr. "Corporations" (Z.) 2; and the same proposition of law is laid down in the Year Book, 21 Edw. 4, 7, 12, &c. [MAULE, J. — That must be taken to mean, that a corporation is not liable *criminaliter* for such acts.] In 1 Kyd on Corporations, p. 71, the proposition is broadly laid down: "Neither can it do or receive a personal injury; and therefore can neither sue nor be sued in an action of trespass for battery or false imprisonment." A corporation is indictable for non-performance of such matters as are cast upon them by law, and which therefore fall within the scope of their duties. In *Reg. v. The Birmingham and Gloucester Railway Company*, 3 Q. B. 223,² a corporation aggregate was indicted for disobedience to an order of justices, requiring them to execute certain works according to a statutory provision. The following cases proceeded upon the principle within which the plaintiffs in error contend their case falls: *Reg. v. The Great North of England Railway Company*, 9 Q. B. 315.³ In *The King of the Two Sicilies v. The Peninsular and Oriental Steam Packet Company*, 19 L. J., Chanc., 488, the Vice-Chancellor expressed an opinion that the defendants, a corporation, could not be indicted under the Enlistment Act. [WIGHTMAN, J. — If a corporation can hold realty, why may not they commit an assault by turning a trespasser off their land? Their answer to an action would be, that although they committed the assault, it was committed in the defence of their property.] In the recent case of *Chilton v. The London and Croydon Railway Company*, 16 M. & W. 212, the plaintiff succeeded in an action of trespass and assault against the Company, but the present objection was not raised. [MAULE, J. — Is it not still open to them?]

¹ E. C. L. R. vol. 56.

² Id. 30.

³ Id. 5.

Secondly, if this action lies against a corporation aggregate, the agent by whom the trespass is committed on their behalf must be duly authorized to commit it by deed, under the common seal of the Company. An assault is not an every day act, which a corporation may direct without the intervention of a solemn instrument. [PATTESON, J. — I think it doubtful whether this point is open upon this bill of exceptions: no objection of the kind was made.] It was objected, that there was no sufficient evidence to render the Company liable. [PATTESON, J. — We are all agreed that there is no necessity for the corporate seal.]

Watson, contra. — The proposition, that an action of trespass for an assault does not lie against a corporation, is untenable in the present age. There is no satisfactory reason to be given why the dicta to be found in the old cases should apply to the present. It has been held, that trespass *quare clausum fregit* and for taking goods lies against a corporation: *Maund v. The Monmouthshire Canal Company*. There is no distinction between injury to the person or to property as affects this question. The argument of the plaintiffs in error is reduced to this, that a corporation cannot commit a trespass, except when they may justify it. But surely a corporation may justify acts done by their authority in the protection of their property. The servants of a Railway Company may remove trespassers; by the same rule, if the removal be wrongful, the Company may be liable for it. Many absurdities would ensue if this were not so. Upon that principle, a Company would not be liable for accidents occasioned by the negligence of their servants, as in the case where a party is injured by a collision. The true rule is laid down by PARKE, B., in delivering the judgment of the Court of Exchequer in *Sharrod v. London and North Western Railway Company*, 4 Exch. 585. The old authorities may be disposed of on the ground that a corporation aggregate is not liable *criminaliter* for the acts of its servants. The propositions in the text books cited have been founded upon a misconstruction or an improper extension of the opinion laid down in the Year Books. If the rule be correct, that a person has a remedy against the Company for the loss of his goods, he has a like remedy for an assault committed against him in the defence of those goods. His remedy against the servant might be of no value whatever to him, as he might be insolvent. It is clear that, on the one hand, it is necessary to the existence of these Companies, that they should have the power of enforcing such rules and regulations as are necessarily required for carrying on the traffic; and on the other hand, it is equally essential that the personal safety and comfort of the public should be rightly defended. In *Reg. v. The Great North of England Railway Company*, 9 Q. B. 326,¹ Lord DENMAN, C. J., said, “The Court of Common Pleas lately held, that a cor

¹ E. C. L. R. vol. 58.

poration might be sued in trespass, but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which has no such duties, cannot be guilty in these cases ; but they may be guilty, as a body corporate, of commanding acts to be done to the nuisance of the community at large."

PATTESON, J. — I have conferred with my learned Brothers upon this case, and we are all of opinion that there is no reason why we should defer our judgment. The first question arises on the declaration itself, and is quite independent of the particular circumstances of this case. It is alleged, on the part of the plaintiffs in error, as a general broad proposition of law, that in no case can an action of trespass for assault and battery lie against a corporation aggregate. Whatever may be the effect of the authorities in the Year Books, it has been expressly held, in modern times, that trespass will lie against a corporation aggregate for breaking and entering a close, and for seizing goods. This has been decided by several recent cases. Then the question is, whether trespass for assault and battery may lie against a corporation ; and it has been contended that it cannot ; for it is said, that it can neither beat nor be beaten. No doubt that proposition is true of it as respects its corporate capacity. But it does not therefore follow, that if a corporation, by authority under seal, direct a servant to apprehend and imprison a particular person, an action for assault and battery cannot be maintained against the corporation. The learned counsel who appears for the plaintiffs in error must contend, in order to show that this declaration cannot be supported, that no such action would lie. But we are all clearly of opinion that it is not so, and that an action of trespass for assault and battery will lie against a corporation, whenever the corporation can authorize the act done, and it is done by their authority. We are therefore of opinion that the declaration is good : and we do not think it necessary to go through the several authorities upon this question. The next question is, whether, in order to render the corporation liable for the act of their servant, it was necessary that that servant should have an authority by deed. It has been decided, many years ago, that a corporation may be liable in tort for the acts of their servants, although their authority be not under seal. It is not necessary, therefore, further to advert to this point.

[The Court then *held*, that there was no sufficient evidence that any previous direction was given by the Company to its servants to enforce the by-laws in the manner here attempted ; and also *held*, that there was no sufficient evidence of ratification by the Company. On these grounds it was adjudged that there must be a *venire de novo*.]

PHILADELPHIA, W., & B. R. R. CO. v. QUIGLEY.

1858. 21 *Howard (U. S.)*, 202.¹

ERROR, to the U. S. Circuit Court for the District of Maryland.

Quigley sued the P. W. & B. R. R. Co. for the publication of a libel by them. Defendants pleaded the general issue.

An investigation was made by the directors into the conduct of the superintendent, including the dealings of the superintendent with the plaintiff, who had also been in the service of the company. In the course of this investigation, the president addressed a letter to an architect, requesting his opinion as to the skill of plaintiff and the value of plaintiff's services. The reply was depreciative of the plaintiff. All the testimony collected by the committee was reduced to writing and printed; first for the use of the president and directors, and afterwards was submitted to the company at their meeting. The testimony, with the report of the committee, fills two printed volumes. The letter of the architect, in answer to the letter of the president, is printed in one of these volumes, and this publication is the libel complained of.

A verdict was returned for the plaintiff.

Schley, and *Donaldson*, for plaintiffs in error.

Johnson, and *Davis*, for defendant.

CAMPBELL, J. [After stating the case.] The defendants contend that they are not liable to be sued in this action; that theirs is a railroad corporation, with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that, being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel; that this action should have been instituted against the natural persons who were concerned in the publication of the libel. To support this argument, we should be required to concede that a corporate body could only act within the limits and according to the faculties determined by the act of incorporation, and therefore that no crime or offense can be imputed to it. That although illegal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created by the direction of their dominant body, that such acts, not being contemplated by the charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents, and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto* or indictment will lie against a corporation for any misfeasance. But this conclusion would be entirely inconsistent with the legislation and jurisprudence of the States of the Union relative to these artificial persons. Legislation has

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

encouraged their organization, as they concentrate and employ the intelligence, energy, and capital of society, for the development of enterprises of public utility. There is scarcely an object of general interest for which some association has not been formed, and there are institutions whose members are found in every part of the Union, who contribute their efforts to the common object. To enable impersonal beings — mere legal entities, which exist only in contemplation of law — to perform corporal acts, or deal with personal agents, the principle of representation has been adopted as a part of their constitution. The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives, is the recognition of a corporate responsibility for the acts of those representatives.

With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judicial tribunals determined the legal relations which are established for the corporation by their governing body, and their agents, with the natural persons with whom they are brought into contact or collision. The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances. At a very early period it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety. *Trespass quare clausum fregit* was supported in 9 Serg. and R. 94; 4 Mann. and G. 452; Assault and Battery, 4 Gray Mass. R. 465; 6 Ex. Ch. 314. For damages by a collision of rail-cars and steamboats, 14 How. 465; 19 How. 543. For a false representation, 34 L. and Eq. R. 14; 11 Wheat. 59.

The court of queen's bench, in *Whitefield v. South Eas. R. R. Co.* (May, 1858), say: "If we yield to the authorities which say that, in an action for defamation, malice must be alleged, notwithstanding authorities to the contrary, this allegation may be proved by showing that the publication of the libel took place by order of the defendants, and was therefore wrongful, although the defendants had no ill will to the plaintiffs, and did not mean to injure them." And the court concluded: "That for what is done by the authority of a corporation aggregate, that a corporation ought as such to be liable, as well as the individuals who compose it."

The question arises, whether the publication is excused by the rela-

tions of the president and directors, as a committee from their board, to the corporation itself.

[Remainder of opinion omitted.]

GREEN v. LONDON GENERAL OMNIBUS CO. (LIMITED).

1859. 7 *Common Bench, New Series*, 290.¹

ACTION against the defendants for wrongfully and maliciously obstructing the plaintiff in his business of an omnibus proprietor.

The declaration, in substance, alleged that defendants, contriving and intending to injure and ruin the plaintiff and to prevent him from carrying on his business, wrongfully, vexatiously, and maliciously placed and drove their omnibuses just before and just behind the plaintiff's omnibuses while plying for hire on the streets, so as to prevent persons from becoming passengers in the plaintiff's omnibuses; also that defendants, with the same intent, etc., drove their omnibuses against the omnibuses and horses of the plaintiff so as to damage the same and to prevent the access of passengers into the plaintiff's omnibuses; also that defendants, with the same intent, etc., caused their servants to place themselves so as to prevent persons from entering plaintiff's omnibuses; also that defendants, with the same intent, etc., hissed, assaulted and beat plaintiff's servants while employed in driving the said omnibuses; also that defendants, with the same intent, etc., caused their omnibuses to precede and follow plaintiff's omnibuses in such a manner as to cause an obstruction to the highway at certain points where plaintiff's omnibuses would, if there were no obstruction, be permitted to wait for a certain space of time to look for passengers: by reason of which said grievances great numbers of persons were prevented from becoming passengers in plaintiff's omnibuses, and plaintiff's omnibuses and horses were injured, and plaintiff was damaged, hindered and obstructed in carrying on his business.

To this declaration the defendants demurred; and the plaintiff joined in demurrer.

Giffard (with whom was *Paterson*), in support of the demurrer. — The declaration alleges a variety of malicious acts done by the company with the intention of obstructing and injuring the plaintiff in carrying on his trade. Now, the gist of the action is the malicious intention; and a corporation cannot as such be actuated by malice. A corporation, according to Lord Coke, — *Sutton's Hospital Case*, 10 Co. Rep. 32 b, — "cannot treason, nor be outlawed, nor excommunicate, for they have no souls; neither can they appear in person, but by attorney; 33 H. 8, Br. Fealty. A corporation aggregate of many cannot do fealty, for, an invisible body can neither be in person, nor swear: *Plowd. Comm.* 213, and the *Lord Berkeley's Case*, 245: it is not subject to imbecilities, death of the natural body, and divers others cases."

¹ Statement abridged. — Ed.

The question is how far the old rule of law in this respect is modified by the recent decisions upon the subject. The most recent authority on the point is that of *Whitfield v. The South Eastern Railway Company*, 1 Ellis, B. & E. 115 (E. C. L. R. vol. 96), where it was held that a count against a railway company, being a corporation aggregate, for a malicious libel, is good on demurrer; for that a corporation aggregate may well, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as would imply malice *in law* sufficient to support the action. But there the judgment proceeded upon the ground that the occasion did not justify the publication, and therefore the law would infer malice.

[After distinguishing *Eastern, &c., R. Co. v. Broom*, 6 Exch. 314, the argument proceeds:]

All the acts that are here attributed to the company are acts which are necessarily *malicious*. The plaintiff must show that he has been injured by the defendants' placing their omnibuses before and behind his *maliciously*. Apart from malice, there is no cause of action. The company in its corporate capacity could not authorize acts which are necessarily unlawful and malicious. The mere obstruction by the defendants of the plaintiff's enjoyment of a public way gives no ground of action: he must show a private and particular damage from an act of the defendants which is intentionally malicious or unlawful: *Hubert v. Groves*, 1 Esp. N. P. C. 148; *Rose v. Miles*, 4 M. & Selw. 101; *Wilks v. The Hungerford Market Company*, 2 N. C. 281 (E. C. L. R. vol. 29), 2 Scott 446 (E. C. L. R. vol. 30). Here, the plaintiff has suffered no grievance which is peculiar to himself. [BYLES, J.—What is the meaning of *maliciously*? ERLE, C. J.—A wilful violation of the law producing damage to an individual, must be presumed to be malicious.] To sustain this declaration, the plaintiff must show some wilful and unlawful and unauthorized interference by the defendants with some private right. [*Grant*, *Amicus Curiae*, referred to the *Quo warranto* in *Rex v. The City of London*, 8 Howell's State Trials 1039, 1305, 1309, where the subject of malice in a corporation is much discussed. CROWDER, J.—Would this declaration be bad without the allegation of malice? Does the allegation mean anything more than wilful?] It is submitted that the whole gist of the action is the malice. The defendants could not justify the specific acts charged without justifying the malicious intention: *Gregory v. The Duke of Brunswick*, 6 M. & G. 205 (E. C. L. R. vol. 46), 6 Scott N. R. 809.

F. Edwards, *contra*. [Argument omitted.]

Giffard, in reply. [Argument omitted.]

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court:—

We are of opinion that our judgment in this case ought to be for the plaintiff. This is an action against the defendants for wrongfully, vexatiously, and maliciously interfering with the plaintiff's rights, by causing their vehicles to be driven in such a manner as to obstruct and

molest the plaintiff in the use of the highway. The declaration alleges various grievances of that general character. To this declaration there is a demurrer raising for our decision the question whether the action will lie. The ground of the demurrer is that the declaration charges a wilful and intentional wrong, and that the defendants, being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie. But the whole of the acts that are charged against the defendants are acts connected with driving vehicles; and the defendants are a company incorporated for the purpose of driving omnibuses, and therefore the acts alleged to have been done by them are all acts which are within the scope and object of their formation. Unless the acts charged were wrongfully done, the plaintiff of course would have no ground of complaint. We are clearly of opinion that the action lies: and there are abundant authorities to warrant that opinion. The whole course of the authorities, from the case of *Yarborough v. The Bank of England*, 16 East 6, down to *Whitfield v. The South Eastern Railway Company*, 1 Ellis, Bl. & E. 115 (E. C. L. R. vol. 96), — which was in reality an action against the Electric Telegraph Company, shows that an action for a wrong will lie against a corporation, where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual. The doctrine relied on by Mr. *Giffard*, — that a corporation, having no soul, cannot be actuated by a malicious intention, — is more quaint than substantial. In coming to the conclusion we arrive at, we have no intention in the smallest degree to interfere with any of the decided cases; but, on the contrary, we found our judgment upon the numerous class of cases of which *Yarborough v. The Bank of England*, — where there is a most learned and elaborate argument of Lord Ellenborough, going fully into all the previous authorities, — is by no means the first, and which afford abundant examples of the application of the principle we now rely on. We may add that we dwell the less upon the grounds which have been urged by Mr. *Giffard* against the maintenance of the action, by reason of the extreme mischief and inconvenience which would follow from our holding that these companies incorporated for the purpose of carrying on trade were exempt from liability for intentional acts of wrong. We think it extremely important that these companies should be held responsible where they admit they have intentionally done a wrongful act, and that those whom they have injured should not be driven to seek a doubtful remedy against their officers or servants, who may be wholly unable to answer the compensation which the jury may award to the injured party. For these reasons, we are of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

GOODSPEED v. EAST HADDAM BANK.

1853. 22 *Connecticut*, 530.¹

CHURCH, C. J. This action is based upon the provisions of our statute, entitled, "An act to prevent vexatious suits," and is subject to the same general principles as are actions on the case, for malicious prosecutions, at common law.

The plaintiff alleges, that the defendants, the East Haddam Bank, a body politic and corporate, without probable cause, and with a malicious intent, unjustly to vex, harass, embarrass, and trouble the plaintiff, commenced, by a writ of attachment, and prosecuted against him, a certain vexatious suit or action for fraudulent representations, to the injury of said bank, and which action resulted in a verdict and judgment against the bank, and in favor of the present plaintiff.

On the trial of this cause, by the superior court, the defendants moved for a nonsuit, on the ground that the plaintiff, by his evidence had failed to make out a *prima facie* case; which motion the court granted, and judgment of nonsuit was entered against the plaintiff, which he now moves to set aside.

The judgment of the superior court, in granting the nonsuit, as we understand, was founded solely upon the ground, that a corporation aggregate was not, by law, liable for such a cause of action as was set up by the plaintiff, in his declaration; at least, no other ground of nonsuit or objection to the plaintiff's action has been argued before us. And, therefore, irrespective of the evidence detailed in the motion, we confine ourselves to what we suppose to be the sole question in the case.

We assume, that the plaintiff has sustained the damage he claims, by reason of the prosecution of the vexatious suit, and the question is, has he a legal remedy against the bank?

The claim of the defendants is, that the remedy for this injury, is to be sought against the directors of the bank, or the individuals, whoever they might have been, by whose agency the vexatious suit was prosecuted, and not against the corporation. We think, that, to turn the plaintiff round, to pursue the proposed remedy, would be trifling with him and with his just rights, and would be equivalent to declaring him remediless; and, in this case, at least, that there was a wrong where there is no remedy. It is notorious that, ordinarily, the action of bank directors is private, — that their records do not disclose the names of the individuals supporting or opposing any resolution or vote, and if they do, that the offending persons may be irresponsible and insolvent. The language of Tilghman, C. J., in a case very similar to the present, in which it was urged, that a corporation was not liable for a suit, but only the individuals committing it, is applicable here. "This doctrine," he said, "was fallacious in principle, and mischievous in its conse-

¹ Statement and arguments omitted. — Ed.

quences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company might do great injury, by means of laborers having no property to answer damages," &c. 4 Serg. & Rawle, 16. To the same effect is the language of Shaw, C. J., in the case of *Thayer v. Boston*, 19 Pick., 511. He says, "The court are of opinion, that this argument, if pressed to all its consequences, and made the foundation of an inflexible, practical rule, would often lead to very unjust results."

Still more explicit is the opinion of the court, in the case of *The Life and Fire Insurance Company v. Mechanics' Fire Insurance Company*, 7 Wend., 31. There, as here, it was contended, that the act was unauthorized, and must therefore be considered as the act of the officers of the company, and not of the company itself. And the court says, "This would be a most convenient distinction for corporations to establish: that every violation of their charter or assumption of unauthorized power, on the part of their officers, although with the full knowledge and approbation of the directors, is to be considered the individual act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers, and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established."

The real nature, as well as the law, of corporations, within the last half century, has been in a progress of development, so that it has grown up, from a few rules and maxims, into a code. In the days of Blackstone, the whole subject of corporations, and the laws affecting them, were discussed within the compass of a few pages; now, volumes are required for this purpose. These institutions have so multiplied and extended within a few years, that they are connected with, and in a great degree influence, all the business transactions of this country, and give tone and character, to some extent, to society itself. We do not complain of this; but we say, that, as new relations, from this cause, are formed and new interests created, legal principles of a practical rather than of a technical or theoretical character must be applied.

And so, in the course of this progress, it has been. It was said by Lord Coke, "that corporations had neither souls nor bodies;" and by somebody else, "that they had no moral sense;" and from thence, or some other equally insufficient reason, it was inferred, and so repeatedly adjudged, that they could not be subjected in actions of trover, trespass, or disseisin, and indeed, that they could not commit wrongs; nor be liable for torts, with a few exceptions, as we shall see.

Had Lord Coke lived in this age and country, he would have seen, that corporations, instead of being the soulless and unconscious beings he supposed, are the great motive powers of society, governing and regulating its chief business affairs; that they act, not only upon pecuniary concerns; but, as having conscience and motives, to an almost unlimited extent, they are entrusted with the benevolent and religious agencies of the day, and are constituted trustees and managers of large funds promotive of such objects.

The views of the old lawyers, regarding the real nature, power, and responsibilities of corporations, to a great extent, are exploded in modern times, and it is believed, that now, these bodies are brought to the same civil liabilities as natural persons, so far as this can be done practically, and consistently with their respective charters. And no good reason is discovered, why this should not be so; nor why it cannot be done, in a case like this, without violating any sensible or useful principle.

And although it was truly said, and for obvious reasons, that corporations could not be punished corporally, as traitors or felons, yet they may be, and have often been, subjected to fines and forfeitures, for malfeasance, and even to the loss of corporate life, by the revocation of their charters. And now it seems to be generally admitted, that they are civilly responsible, in their corporate capacities, for all torts which work injury to others, whether acts of omission or commission; for negligence merely, and for direct violence. *Yarborough v. Bank of Eng.*, 16 East, 6. *Beach v. Fulton Bank*, 7 Cowen, 436. *Foster v. Essex Bank*, 17 Mass., 503. *Riddle v. Proprietors of Locks and Canals*, 7 id., 187. *Chestnut Hill Turnpike v. Rutter*, 4 Serg. & Rawle, 16. 4 Hammond, 500, 514. 10 Ohio Rep., 159. *Dater v. Troy Turnpike Co.*, 2 Hill, 630. 23 Pick., 139. 2 Bl. Com., 476. Ang. & Ames, 392. 2 Kent Com., 290. 1 Sw. Dig., 75. 15 Ohio Rep., 476. 18 id., 229. And indeed, no actions are now more frequent, in our courts, than such as are brought against corporations, for torts, either in case or trespass. *Hooker v. New Haven & Northampton Canal Co.*, 14 Conn. R., 146, and the cases there cited, and many others since reported. In a late case in England, it has been adjudged, adversely to former opinions, that an action of assault and battery may be sustained against a corporation. *Eastern Counties Railway Co. v. Brooks*, 2 Eng. Law & Equity, 406. And it was decided long ago, that a corporation was liable to an action, for a false return to a writ of *mandamus*, alleged to have been made falsely and *maliciously*. 16 East, 8. 14 Eng. Com. Law, 159. 3 Mees. & Wels., 244. Ang. & Ames, ch. 10, sec. 9.

In all the cases, wherein it has been holden, that corporations may be subjected to civil liabilities for torts, the acts charged as such, have been the acts of their constituted authorities, either the directors, or agents, or servants, employed by them. We do not intend here to discuss or decide the frequently suggested question, how far, or when a principal, whether an individual person, or a corporation, becomes responsible for the wilful or malicious act of his servant or agent, as distinguished from his mere negligence, although it has been brought into the argument of this case, because we do not admit, that the present case falls within the operation of the rule of law on this subject, even as the defendants claim it.

The truth is, the action complained of, as vexatious, was instituted by the *bank*, in the name of the bank, and, as should be presumed, in

just the same way and by the same agencies and means, as all other suits by these institutions are commenced and prosecuted, and nothing appears here, showing any different procedure than is usual, in actions by corporations. The action was brought, for the sole benefit of the bank, for the recovery of money to which the bank was entitled, if anybody, and for an injury sustained by the bank, in its corporate capacity. The bank, by its charter, and the general laws, had power to sue for such a cause of action; and what seems to us yet more conclusive, is, that if this suit was originated by the misconduct of directors, or any officer of the company, it has never been repudiated, and may, by the acquiescence of the bank, be considered as sanctioned by it. Ang. & Ames, ch. 10, sec. 9. No act of agency appears here, which does not appear in all suits brought by corporations, and nothing to show, that any individuals are, or ought to be, made responsible for the institution and prosecution of the groundless suit, as distinct from the corporation itself.

The doctrine, that principals are not responsible for the wilful misconduct of their agents, as seems to have been sanctioned in the cases of *McManus v. Cricket*, 1 East, 106; *Wright v. Wilcox*, 19 Wend., 343; *Vanderbilt v. Richmond Turnpike Co.*, 2 Comstock, 470; but denied by Chief Justice Reeve, in his *Domestic Relations*, 357, we think has never been applied to such a case as this, but only to the acts of agents or servants, properly so called; or such as act under instructions and a delegated authority, — persons whose duty it is to obey, not to control; as attorneys, cashiers, or others employed by the corporation. The president and directors of a bank, instead of being mere servants, are really the controlling power of the corporation, — the representatives, standing and acting in the place of the interested parties. Indeed, they are the mind and soul of the body politic and corporate, and constitute its thinking and acting capacity. In the case of *Burrell v. The Nahant Bank*, 2 Met., 163, Shaw, C. J., expresses and defines the true rule of appreciating the character and powers of bank directors. He says: "We think the exception takes much too limited and strict a view of the powers of bank directors. A board of directors is a body recognized by law. By the laws of these corporations, and by the usage, so general and uniform, as to be regarded as a part of the law of the land, they have the general superintendence and active management of all the concerns of the bank, and constitute, to all purposes of dealing with others, *the corporation*. We think they do not exercise a delegated authority, in the sense to which the rule applies to agents and attorneys," &c. The same principle is very distinctly recognized, in the cases of *Bank Commissioners v. Bank of Buffalo*, 6 Paige's Ch., 502, and *Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend., 31. It has been said, that the stockholders constitute the corporation. It may be so, to the extent to which they have the power to act, — and this is only in the choice of directors, and no more. Beyond this, they can only be considered, as the persons

for whose ultimate individual interests the corporation acts. The directors derive all their power and authority from the charter and laws, and none from the stockholders.

But the fear is expressed, that, by thus considering and treating the character and acts of the directors of a bank or other corporation, the stockholders are subject to loss, without fault of their own. This may to some extent, be true; but the protection of the law in this matter, is not to be confined to stockholders; the public and strangers have rights also. The stockholders are volunteers, and they have consented to assume the risk of the faithful or unfaithful management of the corporation. If, in this case, one of two innocent persons or classes is to suffer, which should it be,—that one which is brought in to suffer loss, without its consent or power to prevent it, or the one which has created the power and selected the persons to enforce it?

But, after all, the objection to the remedy of this plaintiff against the bank, in its corporate capacity, is not so much, that, as a corporation, it can not be made responsible for torts committed by its directors, as that it cannot be subjected for that species of tort, which essentially consists in motive and intention. The claim is, that as a corporation is ideal only, it can not act from malice, and therefore, can not commence and prosecute a malicious or vexatious suit. This syllogism, or reasoning, might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one,—they can intend to do evil, as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say, that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned, by the bank, in the usual modes of its action; and still to claim, that, although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application.

It is asked, how can the malice of a corporation be proved? It must be proved, it is said, as well as alleged, in an action for a malicious prosecution, as a distinct and essential fact; and the declarations and admissions of individual members, whether directors or others, are not admissible to prove it. True, malice must be proved, and, as we suppose, very much in the same manner as it is proved in other cases, of a similar nature, against individual persons. The want of probable cause of action is proof of malice, and for aught we know, also, the records of the bank may show it. It is enough to say, in this, as in all other cases, that if the plaintiff can not, in some legitimate way, prove the malice he has alleged, he can not recover; but we have no right to assume it as a legal principle, that it can not be proved. We do not

know that it has ever been adjudged, that a corporation is civilly responsible for a libel. But, among the great variety and objects of these institutions, it is probable that the newspaper press has come in for its share of the privileges supposed to be enjoyed under corporate powers. Proof of the falsehood of slanderous charges, is evidence of malice, and which must, as in this case, be proved. But, would it be endured, that an association, incorporated for the purpose suggested, could, with impunity, assail the character and break down the peace and happiness of the good and virtuous, and the law afford no remedy, except by a resort to insolvent and irresponsible type-setters, and for no better reason, than that a corporation is only an ideal something, of which malice or intention can not be predicated? And if, as we have suggested, the directors are, for all practical purposes, *the corporation* itself, acting, at least, as its representatives, we can see no greater difficulty in proving their motives good or bad, than in thus proving the motives of other associated or conspiring bodies. We are sure, that this objection of the defendants, was not discovered, or was not regarded as sufficient, nor the difficulty of proving malice upon a corporation, felt, when the case of *Merrills v. The Tariff Manufacturing Co.*, 10 Conn. R., 384, was tried at the circuit, and discussed and decided by this court. That was an action against a corporation, for a malicious injury, and the sole question in this court was, whether, by reason of the malicious intent, the company was liable for aggravated or vindictive damages; and it was holden to be thus liable, in a very elaborate opinion, drawn up, and strongly expressed, by Huntington, J.

The interests of the community, and the policy of the law demand that corporations should be divested of every feature of a fictitious character, which shall exempt them from the ordinary liabilities of natural persons, for acts and injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed by others, and they are entitled to an equal protection, for all their rights and privileges, and no more.

For the reasons suggested, a majority of the court is of opinion, that the nonsuit granted by the superior court, should be set aside, and a new trial granted.

In this opinion, WAITE, J., concurred.

ELLSWORTH, J. I do not feel quite satisfied, that the plaintiff can recover against the defendants, for a malicious suit brought, in fact, by the directors of the bank. Certainly, no such action has been found in the books, though I admit there are analogous cases which show, that courts have gone very far in subjecting corporations for wrongs, by their agents, but I think there are none, going to the extent now claimed.

An indispensable requisite, in an action for a malicious suit, is *malice*, — malice in *fact*, — a wicked criminal purpose. An unsuccessful suit is not sufficient. It must have originated in malice; and this idea of

actual, as contradistinguished from legal, malice, is, in my judgment, deserving of the highest consideration. It gives character to the action. The language of Greenleaf, 2 Greenl. Ev., 267, is, "To sustain this averment, (malice,) the charge must be shown to have been wilfully false. Now I ask, in view of this essential requisite, if any such malicious intent can be said to belong to a body of stockholders, (the corporation,) whose affairs are conducted by their agents, under the provisions of the charter of the company, and who, themselves, are in no way or manner *really* implicated in the supposed malicious intent? Again, I ask, whose malice is the ground of the action? not the malice of the president and cashier, — not that of the directors; this is not even admissible in proof against the company. Whose malice then? certainly not that of the ideal corporation; for this is a mere fictitious entity, and can not entertain malice. It must never be forgotten, that malice, as already said, is the very *ground* and gist of the action, and no case has been read to us, of a recovery against a corporation, where there was not a perfect cause of action, independent of any malicious intention. Doubtless the directors may be guilty of malice, and of a malicious injury; but to proceed further, and subject stockholders, for their malice, is quite another question.

It is likewise to be kept in mind, that this action does not belong to that class of actions against corporations, or other principals, for injuries sustained, through a false confidence reposed by strangers in the supposed authority of agents. This action is for an original unauthorized wrong of the directors, and is in no way the result of any false confidence. It is a mere malicious contest between the directors themselves. The stockholders may well say: We can not be involved in this malicious contest. We entertain no malice against Mr. Goodspeed, and no one can entertain it for us.

I think it has been incorrectly assumed, by counsel, that the malicious suit was brought by the East Haddam Bank. It was, in fact, brought by the major vote of the directors. *They* made use of the company name, for *their own malicious* purpose, while they were only intrusted with the powers delegated, for a lawful and laudable purpose. The company do not at all admit, that they are represented in this instance, — no more than they would, had the directors voted that the cashier should inflict personal chastisement upon Mr. Goodspeed, wherever he could find him.

But if this objection is unsound and capable of being surmounted, there is still another, by no means to be overlooked. The act of the defendants is conceded to be wilful and designed; indeed, this is the very ground of the action — *a malicious wrong*. No principle of law is better settled, than that the principal is not liable for the intentional torts of the agent. For his negligence he is liable, but nothing more. To go beyond this, and make him liable for criminal conduct, though in a civil form, would jeopardize the safety of all employers, whether corporations or others, or would prevent the employment of all agents,

because of the great responsibility. It may be politic, to hold principals to greater carefulness on the part of their agents, or servants, but this is all that has hitherto been found expedient or necessary. If now this admitted rule of law, as a general rule, is to be applied to this case, it puts an end to the controversy at once; for a more palpable or wilful wrong, or tortious act, cannot be imagined, than the officers of a bank maliciously and without cause, using the corporate name to oppress or destroy a fellow-director. Of course, I do not say this is so, in this instance; but the plaintiff makes this assumption, in order to recover on this declaration. That the above principle of law *is* applicable to corporations, as well as to other principals, who employ agents, is most learnedly argued and fully decided in the court of appeals of the state of New York. *Vanderbilt v. The Richmond Turnpike Co.*, 2 Com. 481, which was the case of an intentional collision of steamboats in the harbor of New York.

Suppose, in the late catastrophe at Norwalk, the engineer had designedly run the train into the creek, to sink a steamboat passing underneath; would the company have been liable to the owners of the steamboat? True, they would have been liable to the passengers in the cars, because they undertook to carry them safely to the end of the route; but there is no such undertaking, as to strangers. Suppose the engineer had intentionally run over a man on the road, to break his bones; would the company be liable? Suppose the president and directors had themselves conducted the engine with the same intention, and had done the same injury, would the company be liable? Is a town liable for a malicious suit by its selectmen? or a savings bank, for the malicious conduct of its trustees? I answer, in all these cases, no.

It is asked, will you not hold corporations to the same rule of justice and law, as you do all others? I answer, yes, where the cases are parallel. Now, this interrogatory assumes two things, which are not entirely clear or conceded, *viz.*, that you can pass by the only actual malice in the case, and assume malice in the stockholders, or corporation, who are avowedly ignorant and innocent; and further, that the principal is liable for the wilful wrongs perpetrated by his agent. Now, I go for the same rule to all, and therefore, I hold, that those who, in fact, do the wrong, must answer for it. If a different view of the case is taken, and corporations are held liable for the malicious acts of the directors, and other inferior agents, I insist, that a different rule is made to apply to them from others, and that the property of stockholders, vested under the exact limits and provisions of the charter, will be subjected to very great and alarming hazards.

These are, briefly, my views, expressed with no little distrust, since some of my brethren feel well satisfied the plaintiff is entitled to recover.

In this opinion, HINMAN, J., concurred. STORRS, J., having tried the cause in the court below, was disqualified.

Nonsuit set aside, and new trial to be granted.

LAKE SHORE, &c. R. CO. v. PRENTICE.

1893. 147 U. S. 101.¹

ERROR to the U. S. Circuit Court for the Northern District of Illinois.

Action of trespass on the case, by Prentice against the Railway Company, for the unlawful arrest of the plaintiff, by order of the conductor of the train upon which plaintiff was a passenger.

At the trial, and before the introduction of any evidence, the defendant admitted that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor. The evidence tended to prove that the arrest was publicly made, and in a manner especially insulting and humiliating to the plaintiff.

The Circuit Judge instructed the jury as to damages (in part) as follows:—

If the company, without reason, by its unlawful and oppressive act, subjected him to this public humiliation, and thereby outraged his feelings, he is entitled to compensation for that injury and mental anguish.

“I am not able to give you any rule by which you can determine that; but bear in mind, it is strictly on the line of compensation. The plaintiff is entitled to compensation in money for humiliation of feeling and spirit, as well as the actual outlay which he has made in and about this suit.

“And, further, after agreeing upon the amount which will fairly compensate the plaintiff for his outlay and injured feelings, you may add something by way of punitive damages against the defendant, which is sometimes called smart money, if you are satisfied that the conductor’s conduct was illegal (and it was illegal), wanton and oppressive. How much that shall be the court cannot tell you. You must act as reasonable men, and not indulge vindictive feelings towards the defendant.

“If a public corporation, like an individual, acts oppressively, wantonly, abuses power, and a citizen in that way is injured, the citizen, in addition to strict compensation, may have, the law says, something in the way of smart money; something as punishment for the oppressive use of power.”

The jury returned a verdict for the plaintiff in the sum of \$10,000. The defendant moved for a new trial, for error in law, and for excessive damages. The plaintiff thereupon, by leave of court, remitted the sum of \$4000, and asked that judgment be entered for \$6000. The court then denied the motion for a new trial, and gave judgment for the plaintiff for \$6000. The defendant sued out this writ of error.

George C. Greene, for plaintiff in error.

W. A. Foster, for defendant in error.

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

GRAY, J. The only exceptions taken to the instructions at the trial, which have been argued in this court, are to those on the subject of punitive damages.

The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton and oppressive conduct of a conductor of one of its trains towards a passenger.

This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers — such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment — is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several States. *Railroad Co. v. Lockwood*, 17 Wall. 357, 368; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 443; *Myrick v. Michigan Central Railroad*, 107 U. S. 102, 109; *Hough v. Railway Co.*, 100 U. S. 213, 226.

The most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution is to be found in the remarks of Chief Justice Pratt (afterwards Lord Camden) in one of the actions against the King's messengers for trespass and imprisonment under general warrants of the Secretary of State, in which, the plaintiff's counsel having asserted, and the defendant's counsel having denied, the right to recover "exemplary damages," the Chief Justice instructed the jury as follows: "I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Wilkes v. Wood*, Lofft, 1, 18, 19; *S. C.* 19 Howell's State Trials, 1153, 1167. See also *Huckle v. Money*, 2 Wilson, 205, 207; *S. C.*, Sayer on Damages, 218, 221. The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized.

In this court, the doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. *The Amiable Nancy*, 3 Wheat. 546, 558, 559; *Day v. Woodworth*, 13 How. 363, 371; *Phila-*

delphia &c. Railroad v. Quigley, 21 How. 202, 213, 214; *Milwaukee & St. Paul Railway v. Arms*, 91 U. S. 489, 493, 495; *Missouri Pacific Railway v. Humes*, 115 U. S. 512, 521; *Barry v. Edmunds*, 116 U. S. 550, 562, 563; *Denver & Rio Grande Railway v. Harris*, 122 U. S. 597, 609, 610; *Minneapolis & St. Louis Railway v. Beckwith*, 129 U. S. 26, 36.

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*, 3 Wheat. 546.

In that case, upon a libel in admiralty by the owner, master, supercargo and crew of a neutral vessel against the owners of an American privateer, for illegally and wantonly seizing and plundering the neutral vessel and maltreating her officers and crew, Mr. Justice Story, speaking for the court, in 1818, laid down the general rule as to the liability for exemplary or vindictive damages by way of punishment, as follows: "Upon the facts disclosed in the evidence this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals, for all the injuries and losses actually sustained by them. And if this were a suit against the original wrongdoers, it might be proper to go yet farther, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct. But it is to be considered that this is a suit against the owners of the privateer, upon whom the law has, from motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances, we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages." 3 Wheat. 558, 559.

The rule thus laid down is not peculiar to courts of admiralty; for, as stated by the same eminent judge two years later, those courts proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages, as well as damages by way of compensation or remuneration for expenses incurred, or injuries or losses sustained, by the misconduct of the other party. *Boston Manuf. Co. v. Fiske*, 2 Mason, 119, 121. In *Keene v. Lizardi*, 8

Louisiana, 26, 33, Judge Martin said: "It is true, juries sometimes very properly give what is called smart money. They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct. But this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent." To the same effect are: *The State Rights*, Crabbe, 22, 47, 48; *The Golden Gate*, McAllister, 104; *Wardrobe v. California Stage Co.*, 7 California, 118; *Boulard v. Calkoun*, 13 La. Ann. 445; *Detroit Post v. McArthur*, 16 Michigan, 447; *Grund v. Van Vleck*, 69 Illinois, 478, 481; *Becker v. Dupree*, 75 Illinois, 167; *Rosenkrans v. Banker*, 115 Illinois, 331; *Kirksey v. Jones*, 7 Alabama, 622, 629; *Pollock v. Gantt*, 69 Alabama, 373, 379; *Eviston v. Cramer*, 57 Wisconsin, 570; *Haines v. Schultz*, 21 Vroom, (50 N. J. Law.) 481; *McCarty v. De Armit*, 99 Penn. St. 63, 72; *Clark v. Newsam*, 1 Exch. 131, 140; *Clissold v. Machell*, 26 Upper Canada Q. B. 422.

The rule has the same application to corporations as to individuals. This court has often, in cases of this class, as well as in other cases, affirmed the doctrine that for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible, in the same manner and to the same extent, as an individual is responsible under similar circumstances. *Philadelphia &c. Railroad v. Quigley*, 21 How. 202, 210; *National Bank v. Graham*, 100 U. S. 699, 702; *Salt Lake City v. Hollister*, 118 U. S. 256, 261; *Denver & Rio Grande Railway v. Harris*, 122 U. S. 597, 608.

A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal. *Philadelphia & Reading Railroad v. Derby*, 14 How. 468; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637; *Howe v. Neumarch*, 12 Allen, 49; *Ramsden v. Boston & Albany Railroad*, 104 Mass. 117. A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. *Philadelphia &c. Railroad v. Quigley*, 21 How. 202, 211; *Salt Lake City v. Hollister*, 118 U. S. 256, 262; *Reed v. Home Savings Bank*, 130 Mass. 443, 445, and cases cited; *Krulevitz v. Eastern Railroad*, 140 Mass. 573; *McDermott v. Evening Journal*, 14 Vroom, (43 N. J. Law.), 488 and 15 Vroom, (44 N. J. Law.) 430; *Bank of New South Wales v. Owston*, 4 App. Cas. 270. But, as well observed by Mr. Justice Field, now Chief Justice of Massachusetts: "The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or

fraud, but, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages." *Lothrop v. Adams*, 133 Mass. 471, 480, 481.

Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate. In *Detroit Post v. McArthur*, in *Eviston v. Cramer*, and in *Haines v. Schultz*, above cited, it was held that the publisher of a newspaper, when sued for a libel published therein by one of his reporters without his knowledge, was liable for compensatory damages only, and not for punitive damages, unless he approved or ratified the publication; and in *Haines v. Schultz* the Supreme Court of New Jersey said of punitive damages: "The right to award them rests primarily upon the single ground — wrongful motive." "It is the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent knowledge is an essential prerequisite." "Absence of all proof bearing on the essential question, to wit, defendant's motive — cannot be permitted to take the place of evidence, without leading to a most dangerous extension of the doctrine *respondere superior*." 21 Vroom, (50 N. J. Law,) 484, 485. Whether a principal can be criminally prosecuted for a libel published by his agent without his participation is a question on which the authorities are not agreed; and where it has been held that he can, it is admitted to be an anomaly in the criminal law. *Commonwealth v. Morgan*, 107 Mass. 199, 203; *Regina v. Holbrook*, 3 Q. B. D. 60, 63, 64, 70, and 4 Q. B. D. 42, 51, 60.

No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. *Philadelphia &c. Railroad v. Quigley*, *Milwaukee & St. Paul Railway v. Arms*, and *Denver & Rio Grande Railway v. Harris*, above cited; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Bell v. Midland Railway*, 10 C. B. (N. S.) 287; *S. C. 4 Law Times* (N. S.) 293.

Independently of this, in the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is, of course, liable to make compensation for the whole injury suffered. *Kennon v. Gilmer*, 131 U. S. 22; *Meagher v. Driscoll*, 99 Mass. 281, 285; *Smith v. Holcomb*, 99 Mass. 552; *Hawes v. Knowles*, 114 Mass. 518; *Campbell v. Pullman Car Co.*, 42 Fed. Rep. 484.

In the case at bar, the defendant's counsel having admitted in open court "that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor, the jury were rightly in-

structed that he was entitled to a verdict which would fully compensate him for the injuries sustained, and that in compensating him the jury were authorized to go beyond his outlay in and about this suit, and to consider the humiliation and outrage to which he had been subjected by arresting him publicly without warrant and without cause, and by the conduct of the conductor, such as his remark to the plaintiff's wife.

But the court, going beyond this, distinctly instructed the jury that "after agreeing upon the amount which will fully compensate the plaintiff for his outlay and injured feelings," they might "add something by way of punitive damages against the defendant, which is sometimes called smart money," if they were "satisfied that the conductor's conduct was illegal, wanton and oppressive."

The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantonness and oppression on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principles above stated, unsupported by any decision of this court, and opposed to the preponderance of well considered precedents.

[The learned Judge then stated, and quoted from *R. Co. v. Derby*, 14 Howard, 470, 471; *R. Co. v. Quigley*, 21 Howard, 210, 213, 214; and *R. Co. v. Arms*, 91 U. S. 495.]

In *Denver & Rio Grande Railway v. Harris*, the railroad company, as the record showed, by an armed force of several hundred men, acting as its agents and employes, and organized and commanded by its vice-president and assistant general manager, attacked with deadly weapons the agents and employes of another company in possession of a railroad, and forcibly drove them out, and in so doing fired upon and injured one of them, who thereupon brought an action against the corporation, and recovered a verdict and judgment under an instruction that the jury "were not limited to compensatory damages, but could give punitive or exemplary damages, if it was found that the defendant acted with bad intent, and in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by the other company, and in so doing shot the plaintiff." This court, speaking by Mr. Justice Harlan, quoted and approved the rules laid down in *Quigley's case*, and affirmed the judgment, not because any evil intent on the part of the agents of the defendant corporation could of itself make the corporation responsible for exemplary or punitive damages, but upon the single ground that the evidence clearly showed that the corporation, by its governing officers, participated in and directed all that was planned and done. 122 U. S. 610.

The president and general manager, or, in his absence, the vice-president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it, that any wanton, malicious or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself.

But the conductor of a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce.

[The learned Judge here stated, and quoted from *Hagan v. R. Co.*, 3 R. I. 88, 91; and also stated *Cleghorn v. R. Co.*, 56 N. Y. 44. He then proceeds to quote from the opinion in the latter case as follows:—]

Chief Justice Church, delivering the unanimous judgment of the court, stated the rule as follows: "For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified." *Cleghorn v. New York Central Railroad*, 56 N. Y. 44, 47, 48.

Similar decisions, denying upon like grounds the liability of railroad companies and other corporations, sought to be charged with punitive damages for the wanton or oppressive acts of their agents or servants, not participated in or ratified by the corporation, have been made by the courts of New Jersey, Pennsylvania, Delaware, Michigan, Wisconsin, California, Louisiana, Alabama, Texas and West Virginia.

It must be admitted that there is a wide divergence in the decisions of the state courts upon this question, and that corporations have been held liable for such damages under similar circumstances in New Hampshire, in Maine, and in many of the Western and Southern States. But of the three leading cases on that side of the question, *Hopkins v. Atlantic & St. Lawrence Railroad*, 36 N. H. 9, can hardly be reconciled with the later decisions in *Fay v. Parker*, 53 N. H. 342, and *Bixby v. Dunlap*, 56 N. H. 456; and in *Goddard v. Grand*

Trunk Railway, 57 Maine, 202, 228, and *Atlantic & Great Western Railway v. Dunn*, 19 Ohio St. 162, 590, there were strong dissenting opinions. In many, if not most, of the other cases, either corporations were put upon different grounds in this respect from other principals, or else the distinction between imputing to the corporation such wrongful act and intent as would render it liable to make compensation to the person injured, and imputing to the corporation the intent necessary to be established in order to subject it to exemplary damages by way of punishment, was overlooked or disregarded.

Most of the cases on both sides of the question, not specifically cited above, are collected in 1 Sedgwick on Damages, (8th ed.) § 380.

In the case at bar, the plaintiff does not appear to have contended at the trial, or to have introduced any evidence tending to show, that the conductor was known to the defendant to be an unsuitable person in any respect, or that the defendant in any way participated in, approved or ratified his treatment of the plaintiff; nor did the instructions given to the jury require them to be satisfied of any such fact before awarding punitive damages. But the only fact which they were required to find, in order to support a claim for punitive damages against the corporation, was that the conductor's illegal conduct was wanton and oppressive. For this error, as we cannot know how much of the verdict was intended by the jury as a compensation for the plaintiff's injury, and how much by way of punishing the corporation for an intent in which it had no part, the

Judgment must be reversed, and the case remanded to the Circuit Court, with directions to set aside the verdict, and to order a new trial.

MR. JUSTICE FIELD, MR. JUSTICE HARLAN and MR. JUSTICE LAMAR took no part in this decision.

NIMS v. MOUNT HERMON BOYS' SCHOOL.

1893. 160 Mass. 177.

KNOWLTON, J. The defendant is an educational corporation. The plaintiff seeks to recover damages for an injury received through the negligence of a ferryman in managing a boat on which he was a passenger, and which, as he alleges, the defendant was using at a public ferry in the business of carrying passengers for hire. At the request of the defendant, the presiding justice ruled that there was no evidence to warrant a finding for the plaintiff, and directed a verdict for the defendant. The defendant contends that the ruling should be sustained on one or both of two grounds. It says in the first place, that, if it maintained the ferry and hired and paid the ferryman, the business was

ultra vires, and therefore it is not liable for negligence in the management of the boat. Secondly, it contends that there was no evidence to connect the corporation with the business of running the ferry-boat, or to show that the ferryman was its servant.

It is a general rule that corporations are liable for their torts as natural persons are. It is no defence to an action for a tort to show that the corporation is not authorized by its charter to do wrong. Recovery may be had against corporations for assault and battery, for libel and for malicious prosecution, as well as for torts resulting from negligent management of the corporate business. *Moore v. Fitchburg Railroad*, 4 Gray, 465. *Reed v. Home Savings Bank*, 130 Mass. 443. *Fogg v. Boston & Lowell Railroad*, 148 Mass. 513. *Philadelphia, Wilmington, & Baltimore Railroad v. Quigley*, 21 How. 202, 209. *Merchants' Bank v. State Bank*, 10 Wall. 604. *National Bank v. Graham*, 100 U. S. 699. *Gruber v. Washington & Jamesville Railroad*, 92 N. C. 1. *Hussey v. Norfolk Southern Railroad*, 98 N. C. 34. If a corporation by its officers or agents unlawfully injures a person, whether intentionally or negligently, it would be most unjust to allow it to escape responsibility on the ground that its act is *ultra vires*. The only plausible ground on which the defendant in the present case can contend that it should be exempt from liability for the negligence of its servant in managing the ferry-boat is that the contract to carry the plaintiff was *ultra vires*, and therefore invalid, and that the duty for neglect of which the plaintiff sues arose out of the contract, and disappears with it when the contract appears to be void. The defendant may argue that the plaintiff cannot maintain an action for a breach of the contract to use proper care to carry him safely, and that he stands no better when he sues in tort for failure to do the duty which grew out of the contract.

In *Bissell v. Michigan Southern & Northern Indiana Railroad*, 22 N. Y. 258, the plaintiff founded his action on the negligence of the two defendants while jointly running cars on a railroad in a State to which the charter of neither of them extended, and it was conceded that the defendants were acting *ultra vires*. The plaintiff recovered, Comstock, C. J. holding in an elaborate opinion that the corporations were liable under their contract, notwithstanding that the contract was *ultra vires*, and that if they could not be held under their contract they could not be held at all, inasmuch as the only negligence alleged was a failure to use the care which the contract called for. Selden, J., in an equally full and elaborate opinion, held that the contract for carriage was invalid, and that there could be no recovery under it, nor for negligence founded upon it; but it was his opinion that, if the contract were set aside, the defendants owed the plaintiff a duty founded on his relation to them as an occupant, with their permission, of a place in their car, and that the improper management of the car was a neglect of that duty for which the plaintiff could recover. Clerke, J. agreed with this view, and all but one of the other judges concurred in a decision

for the plaintiff, without stating the ground on which they thought the decision should be placed. This case was followed in *Buffett v. Troy & Boston Railroad*, 40 N. Y. 168, in which it was held that a railroad corporation was liable for negligence of the driver of a stage-coach which it was running without a legal right to do a business of that kind; but the opinion does not show whether the decision is founded on the opinion of Comstock, C. J., given in the former case, or on that of Selden, J. Like decisions have been made under similar facts in *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572; *New York, Lake Erie, & Western Railway v. Haring*, 18 Vroom, 137; and *Hutchinson v. Western & Atlantic Railroad*, 6 Heisk. 634.

The better doctrine seems to be that a contract made by a corporation in violation of its charter, or in excess of the powers granted to it either expressly or by implication, is invalid considered merely as a contract, and, so long as it is entirely executory, will not be enforced. It is not only a violation of a private trust, viewed in reference to the stockholders, but it is against the policy of the law, which intends that corporations deriving their powers solely from the Legislature shall not pass beyond the limits of the field of activity in which they are permitted by their charter to work. *Monument National Bank v. Globe Works*, 101 Mass. 57. *Attorney General v. Tudor Ice Co.* 104 Mass. 239. *Davis v. Old Colony Railroad*, 131 Mass. 258. *Thomas v. Railroad Co.* 101 U. S. 71. *Leslie v. Lorillard*, 110 N. Y. 519. *Linkauf v. Lombard*, 137 N. Y. 417. *East Anglian Railways v. Eastern Counties Railway*, 11 C. B. 775, 803. On the other hand, courts have frequently held that, while such contracts considered merely as contracts are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one who, after entering into such a contract and inducing a change of condition by another party, attempts to avoid the contract by a plea of *ultra vires*. It is said that such a plea will not avail when to allow it would work injustice and accomplish legal wrong. *Leslie v. Lorillard*, 110 N. Y. 519. *Linkauf v. Lombard*, 137 N. Y. 417, 423. Many cases might be supposed in which it would be most unjust to hold that one who had received the benefits of such a contract might retain them and leave the other party without remedy, as he might do in a supposable case, where another had put himself at a disadvantage on the faith of a contract with him to commit a crime. Whether in this Commonwealth a contract entered into by a corporation *ultra vires*, and partly performed, will ever be enforced on equitable grounds, we need not now decide. See *McCluer v. Manchester & Lawrence Railroad*, 13 Gray, 124; *National Pemberton Bank v. Porter*, 125 Mass. 333; *Attleborough National Bank v. Rogers*, 125 Mass. 339; *Atlas National Bank v. Savery*, 127 Mass. 75, 77; *Slater Woollen Co. v. Lamb*, 143 Mass. 420; *Prescott National Bank v. Butler*, 157 Mass.

548; *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Parish v. Wheeler*, 22 N. Y. 494; *Oil Creek & Allegheny River Railroad v. Pennsylvania Transportation Co.* 83 Penn. St. 160; *Bradley v. Ballard*, 55 Ill. 413. In the present case we think it makes no difference that the defendant was not a manufacturing or trading corporation, but was chartered for educational purposes only. It could acquire and hold property, make contracts, and do anything else incidental to the maintenance of the school. Doubtless some of its officers or agents thought it would be an advantage to its students and managers to have a public ferry at the place where the plaintiff was injured. Its maintenance of such a ferry was *ultra vires* but its acts in that respect were not different in kind from the ordinary acts of corporations in excess of the powers given them by their charter. We are of opinion, therefore, that if the defendant while running the ferry-boat accepted the plaintiff as a passenger to be transported for hire, and undertook to carry him across the river, he was in the boat as a licensee, it owed him the duty to use proper care to carry him safely, and, whether an action could be maintained for a breach of the contract or not, it is liable to the plaintiff in an action of tort for neglect of that duty.

The other question in the case is whether there was evidence that the corporation operated the ferry. Under its by-laws the management of the corporation is vested in a board of trustees. It does not appear that any vote was ever taken in regard to the ferry, and it was not shown that any officer of the corporation took out the license which was granted to the defendant by the county commissioners, under Pub. Sts. c. 55, § 1, to keep the ferry, but the records of the county commissioners show that such a license was granted, and that a bond with sureties was given to the county of Franklin, with the condition properly to perform the duty of a ferryman, executed in behalf of the defendant by one who was designated as superintendent, and witnessed by the defendant's cashier and paymaster. It further appeared that the title to the property used at the ferry was taken by Ambert G. Moody, one of the trustees of the defendant, who was then a student in Amherst College, and that he paid for it only a nominal sum above the mortgage existing upon it, and that he and the defendant's superintendent, who had charge of its farm, employed one Deane to operate the ferry, who was paid by the month, and who turned over the balance of the receipts of the ferry above his wages to the defendant's cashier and paymaster. For the month of April Deane was paid for his services by the defendant's paymaster out of the defendant's funds. In June, 1890, a new ferry-boat was constructed under an arrangement with Ambert G. Moody and Dwight L. Moody, both of whom were trustees of the corporation, and was paid for by the paymaster out of the funds of the corporation. For six months, and until there was a change in the management of the ferry, the defendant's cashier and paymaster sent to the treasurer, who lived in New York,

monthly accounts, showing monthly receipts and expenses on account of the ferry. Accompanying the first of these accounts was a statement that the school was running the ferry and paying the bills. The treasurer was himself a trustee of the corporation. He subsequently rendered his official report to the corporation, which was audited by another of the trustees, who did not examine the items in person, but caused the examination to be made by a man in his employment. This report was accepted by the trustees and placed on file. The items of receipts and expenditures were entered on the books of the treasurer in an account under the title "ferry." The treasurer's report was not put in evidence, and was not produced, although the defendant was notified to produce it.

There is no evidence of original authority from the defendant to anybody to operate the ferry on its account, but the evidence is plenary that persons connected with the management of its business assumed so to operate it. The important question is whether there was evidence that the corporation ratified the acts of these persons. We are of opinion that there was evidence from which the jury might have found such ratification. It is not necessary that the ratification should be by a formal vote. It is enough if the corporation, acting through its managing officers, knowing that the business had been done by those who assumed to act as its agents in doing it, and that the income of the business had been received and the expenses of it paid by its treasurer in his official capacity, and that the balance of the receipts above the expenditures was in its treasury, adopted the action of its treasurer, and elected to keep the money. It was a fair inference of fact, especially when the corporation failed to produce the treasurer's report after notice to produce it, that the report contained a true statement of the accounts which related to the ferry, and that it was accepted with full knowledge on the part of the trustees of what it contained. Whether there was a ratification by the corporation was a question of fact for the jury on all the evidence.

If there was such a ratification, it carried with it the consequences which would have followed an original authority. In *Dempsey v. Chambers*, 154 Mass. 330, it was held, after much consideration, that ratification of an unauthorized act would make the principal liable in an action of tort for an injury resulting from negligence of the agent in doing the act.

We are of opinion that the case should have been submitted to the jury.

Exceptions sustained.

D. Malone, for the plaintiff.

C. C. Conant, for the defendant.

CENTRAL R. R. & BANKING CO. v. SMITH.

1884. 76 *Alabama*, 572.¹

APPEAL from Circuit Court.

Action by Smith against the appellant, described as "a corporation created by the laws of Georgia, and doing business in Alabama by agents." Plaintiff seeks to recover damages for injuries sustained by the sinking of the steamboat *George W. Wylly*, while running on the Chattahoochee river; the plaintiff having been a passenger at the time.

The complaint alleged that the defendant corporation was a common carrier, and was, in connection with one Whitesides (who was not sued), the owner and proprietor of said steamboat, and engaged in running and operating it for the transportation of passengers and freight for a reward; and that the accident and injury were caused by the negligence of the officers and persons in charge of the boat, and its unsound and rotten condition. The defendant pleaded not guilty, and a special plea which averred, in substance, that it had no authority under its charter to engage in running a steamboat on the Chattahoochee river, and that the persons who were engaged in running said steamboat, at the time of the alleged loss and injury, were not the agents or servants of said defendant. Issue was joined on both of these pleas.

Upon the trial certain evidence was admitted, against defendant's objection, to prove ownership of the steamer, and partnership or agency in operating it.

The Court, at defendant's request, instructed the jury that the defendant had no power under its charter to own or operate the steamboat. The Court, however, at plaintiff's request, added to this instruction: "But this will not excuse defendants, if the evidence shows they did operate it." To this addition, defendant excepted.

J. D. Roquemore, and *John Peabody*, for appellant.

S. F. Rice, and *H. R. Shorter*, *contra*.

CLOFTON, J. [The Court *held*, that certain evidence was improperly admitted. The Court also *held*, that the corporation had no power, under its charter, to own and operate the steamboat in association with a natural person. The opinion then proceeds as follows:]

7. With the postulate assumed, that the defendant has no authority to own and operate, in association with a natural person, a steamboat on the Chattahoochee river, for carrying persons and freights, there remains to be considered the liability of the defendant to a person for injuries suffered on a boat thus owned and operated, while a passenger thereon.

This court has repeatedly decided, that the contracts of corporations, which they have no power to make, are void, and that the courts will

¹ Statement abridged. Argument and part of opinion omitted. — Ed.

not enforce them. "Such contracts on the part of a corporation are *ultra vires*, and void, and no right of action can spring out of them." — *Marion Sav. Bank v. Dunkin*, 54 Ala. 471; *Chambers v. Falkner*, 65 Ala. 448. No contract made by a corporation, not within the scope of its powers, can be made valid, or the foundation of a right of action, by the assent of the shareholders. If the corporation attempts to carry such contract into execution, dissentient stockholders, though a minority, may restrain its consummation. And if suit is brought against the corporation on such contract, they may avail themselves of the defense of *ultra vires*. — *Davis v. Old Col. R. R. Co.*, 131 Mass. 258. The settled doctrine of this court is, that a reception and retention of the fruits and benefits of the transaction do not estop the corporation from denying its power to make the contract; though an action may be maintained, in a proper case, against a corporation, for the money or property received, the legal effect of such suit being a disaffirmance of the prohibited contract.

Were the present action founded on a contract of transportation, it is unquestionable, that the defendant could successfully interpose the defense of *ultra vires*. The action is, however, *ex delicto*, founded on the common-law duty of a common carrier. The plaintiff does not require the aid of an illegal contract to establish his case; its enforcement is not necessary to entitle him to a recovery. The rules applicable are those which govern in cases of torts committed by a corporation. The question is, what is the liability of a corporation for a tort, committed while transacting a business without and beyond the purview of the corporate powers and purposes? This is followed by another question; by what authority, and in what manner, can a corporation be subjected to such liability?

While, as the law confers no power or permission to commit a wrongful act, every species of tort may be technically *ultra vires*, it is well established, that corporations may commit almost every kind of tort, and be liable to an action for the same. In such case, the doctrine of *ultra vires* has no application. — *Mer. Bank v. State Bank*, 10 Wall. 604. "A corporation is liable to the same extent, and under the same circumstances as a natural person, for the consequences of its wrongful acts, and will be held to respond in a civil action, at the suit of an injured party, for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature, or beyond its general powers, the wrongful transaction or act may be." — *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30. Accordingly, actions have been maintained against corporations for libel, malicious prosecutions, assault, and other torts too numerous to be mentioned. — *Green v. Lon. Gen. Om. Co.*, 7 Com. B., N. S. 388; *P. W. & B. R. R. Co. v. Quigby*, 21 How. 202; *Jordan v. Ala. Gt. So. R. R. Co.*, 74 Ala. 85. Generally, it may be said, that corporations are liable for the consequences of tortious acts done by its authority, though not within the scope of its powers, express, implied, or incidental. The distinc-

tion between the liability of a corporation, on an unauthorized contract, and for a negligent or wrongful act in the performance of such contract, is clearly and properly drawn by Selden, J., in *Bissell v. Mich. So. & No. Ind. R. R. Cos.*, 22 N. Y. 258; which was an action by a passenger on a train of cars, which by contract the two companies were unitedly running, for a breach of duty to convey him safely, the passenger having been injured by the negligence of their servants. The defense of the companies was, that, in making the contract, they transcended their powers, and, consequently, in judgment of law, they were not operating the road, and did not undertake to carry the plaintiff over it. After holding that the contract to operate the consolidated roads, and to transport the plaintiff, was illegal and void, he says: "It is said, that if the contract was *ultra vires*, and the corporation is protected from all responsibility for its violation on that ground, it must be equally free from responsibility for an injury inflicted while attempting to perform it. But this, I apprehend, by no means follows, though it is probably true, so far as the duty to observe due care grows out of the contract. The plaintiff's claim, however, rests not upon his contract, but upon the right which every man has to be protected from injury through the carelessness of others. It has the same legal foundation as that of one who has been injured by the negligent driving of some person upon the public highway, or has been run over by a train of cars, when crossing the railroad track. The duty to observe care, in these cases, arises, not upon any contract, but from the obligation which rests upon all persons, whether natural or artificial, so to conduct as not through their negligence to inflict injury upon others." An exemption from liability in such cases, because the act is *ultra vires*, would be a license to corporations to do wrongs to others. From these principles it follows, that if the defendant undertook the business of transporting persons by a mode of conveyance other than that authorized and provided by the charter, its duties and responsibilities to a passenger are the same as if the business was authorized and legal.

8. But, before the duties and responsibilities attach, the corporation must undertake and engage in the business, and thereby assume its burdens. Of this there can be no implication, from the isolated fact, that some officer or agent has engaged, in the name of the company, in running and operating the boats; in other words, there can be no implication that a corporation has made a contract, or engaged in business transcending its powers. — Green's *Brice's Ul. Vires*, 364. It may be inferred from proved circumstances, as other facts, but is not the subject of implication. Corporations are responsible for the wrongs committed by their officers, agents, or servants, while in the course of their employment; but, if the officer, agent, or servant, "go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master or employer is not." *Gilliam v. S. & N. R. R. Co.*, 70 Ala. 268.

The limitation is, the scope of the employment, or delegated authority. If an officer or agent can not directly subject the corporation to liability for his tortious act beyond the range and course of his employment, though done while engaged in its performance, for what reason, or on what principle is it, that an officer or agent can, by making an unlawful transaction, and engaging in an unauthorized and unlawful business, in the name of the company, without the authority of the corporation, indirectly subject it to liability for the negligent or intentional wrongs of the agents or servants employed by him in the performance of such contract, or in carrying on such business? While corporations should be held to a strict responsibility for the wrongful acts of their employees, when done in the course of their employment, and connected with the execution of the business for which incorporated, they should be protected against the consequences of unauthorized acts of their officers or agents, committed in excess of its powers, and unconnected with the business or purposes of their incorporation and organization, especially when dealing with persons charged with notice of their powers, and the nature and extent of the employment and authority of the officer or agent.

In *Brokaw v. N. J. R. & T. Co.*, 32 N. J. Law, 328, it is said: "In considering the question whether the agent has the authority of the corporation, so as to make it answerable for his act, the purposes for which the company was incorporated must not be overlooked. An authority given even by the board of directors, in express terms, will not, in all cases, be the authority of the corporation. The directors are only agents themselves, and their powers are necessarily limited within the scope of the purposes for which the corporation was created, beyond which they are not authorized to bind the corporation. To fix the liability of a corporation for the tortious acts of one of its employees, done in obedience to the commands of its officers, the act must be connected with the transaction of the business for which the company was incorporated. If the directors should order an agent to take a person out of his house and beat him; or if the directors of a banking company should purchase a steamboat, and engage in transporting passengers, the corporation would not be liable for the misfeasance or nonfeasance of agents employed in that business." It is true that the board of directors may be invested by the charter, or general law, with such management and authority as practically to constitute it the corporation; but, by the provisions of the charter of the defendants, the directors are agents and representatives, with authority limited by the scope of the powers, business, and purposes of the corporation. It will be observed that the business was not carried on in the name of the corporation. As there is no implied authority of any officer or agent to make an *ultra-vires* contract, or transaction, and on that ground merely bind the corporation, it follows, that if the boats were purchased and engaged, in connection with Whitesides, in the business of transporting persons and freight on the Chattahoochee river, by the presi-

dent, superintendent, or even the directors, the corporation is not bound thereby, and is not liable for the negligent or wrongful acts of the persons employed in such business, unless the transaction was previously authorized, or subsequently ratified by the corporation. Without such authority or ratification, the persons thus employed are not the agents or employees of the corporation. As the immediate or direct act of the officer or agent, in such case, can not bind the corporation, his mere knowledge of, and acquiescence in the prosecution of such business, are not tantamount to a ratification by the corporation. Considering the difference between the principles which govern the liability of the company for the tortious acts of its agents committed in the course of their authorized employment, and its liability for the tortious acts of persons employed in the conduct and prosecution of a business undertaken on behalf of the corporation by its agents, beyond the range of their employment, and prohibited by the laws of its creation, the previous authority or subsequent ratification, in order to bind the corporation, must be in corporate capacity.

A corporation is an artificial body, a distinct person, in legal contemplation, from the stockholders, in which the corporate property is vested. Its will is usually or ordinarily expressed at a meeting of the corporators. Its officers are its agents, and not the agents of the stockholders. In this sense, previous authority, to bind the corporation by the act of an officer or agent transcending its powers and unconnected with its authorized business and purposes, must be the result of corporate action, as contradistinguished from the individual action of the stockholders or officers. Subsequent ratification results, when a knowledge of the business being thus conducted, and of the reception and retention of its fruits and benefits, is brought home to the corporators, at a time, and under circumstances which require them to elect to repudiate or be bound, and they fail to disavow the act; in other words, any facts, which would be a ratification of the unauthorized acts of an agent by a principal who is a natural person.

An application of these principles will probably be a sufficient guide on another trial.

Reversed and remanded.

THACHER v. DARTMOUTH BRIDGE CO.

1836. 18 *Pickering (Massachusetts)*, 501.

THIS was trespass for breaking the plaintiffs' close in Dartmouth, digging up the soil, and erecting a toll house thereon, &c.

The defendants, in their plea, justified the breaking, &c. under *St. 1827, c. 54*, whereby they were constituted a corporation, and were authorized to erect a bridge over a certain bar in Apponegansett river,

from the western shore, to the most convenient point on the eastern shore, and they averred, that the close in question was situated on the eastern side of the river, at a convenient point for the termination of the bridge.

The plaintiffs demurred.

Coffin and Clifford, for the plaintiffs, cited *Perry v. Wilson*, 7 Mass. R. 393; *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. R. 466.

A. Bassett and Ezra Bassett, for the defendants.

SHAW, C. J., delivered the opinion of the Court. In the present case, it is admitted by the defendants, that the act of incorporation under which they were authorized to erect their bridge, did not provide any mode of ascertaining or paying the damage, which any individual owners of land might sustain, by the appropriation of their property. We also understand, that by the act there is no express authority granted to the corporation to appropriate to themselves the use of private property, without the consent of the owners. The question then is, whether the plea filed in the case forms a good justification for an act, which, it is admitted by the pleadings, would be a violation of the plaintiffs' right of property and an act of trespass, without such justification.

In the first place, we think it very clear, that where the legislature, in the exercise of that high sovereign power, by which they are authorized to take private property for public uses, confer, or intend to confer, that power upon a corporation, they do it in express terms, or by necessary implication. It is not to be presumed, that such a power is intended to be granted, unless the intent to do so, can be clearly discovered in the act itself. In the present case, there is no such power in terms, and we think there is none by implication. It is not a satisfactory answer, to say, that without it the bridge could not be erected, because the consent of the owner might be obtained by gift or purchase of the land or an easement in it; and it might be expected, that the proprietors, over whose lands it would pass, and who might probably be benefited by it, would readily yield their consent. *Perry v. Wilson*, 7 Mass. R. 393. If it be said, that with such consent, the proprietors might proceed without an act of legislation, and that such an act was principally necessary to enable them to take private property, the answer is obvious, that with the consent of all the private proprietors, over whose land it would pass, an act of the legislature would still be necessary, to enable them to erect a toll bridge over navigable water; and without it such a bridge would be a nuisance and a usurpation of public rights, both as being an obstruction over navigable water, and as claiming a right to levy toll.

But supposing that the act could be so construed, as to confer a power on the corporation to take private property for public use, without providing for an equitable assessment, and for the payment of an adequate indemnity, the act would, in this respect, be in contravention of the constitution of this Commonwealth, and in this respect void;

and so would not afford the justification relied on. The consequence would be, that the party damaged would be remitted to his remedy at common law; the wrongful act would stand unjustified by legislative grant. This has been so often decided in this Commonwealth, that it must be taken as a settled principle. *Chadwick v. Proprietors of Haverhill Bridge*, 2 Dane's Abr. 686; *Stevens v. Middlesex Canal Co.*, 12 Mass. R. 466.

So that whether the act of incorporation pleaded by the defendants, and which is to be deemed a public act, and taken notice of accordingly, did or did not confer the power of taking private property, for the erection of this bridge, as it made no provision for the security and payment of an indemnity to individual proprietors, such proprietors may assert their property and possession, in the same manner as if the law had not been passed.

*Plea adjudged bad, and judgment for the plaintiffs.*¹

METROPOLITAN SALOON OMNIBUS CO. (LIMITED) v.
HAWKINS.

1859. 4 Hurlstone & Norman, 87.

DECLARATION — The Metropolitan Saloon Omnibus Company (Limited), duly incorporated by the style and name aforesaid under and by virtue of the provisions of a certain act of parliament &c. (19 & 20 Vict. c. 47), by &c., their attorney, sue &c.: For that the defendant falsely and maliciously did publish in a certain letter addressed and sent by the defendant to one R. Bevan the words following. (The declaration then set out the letter, which imputed to the Company insolvency, mismanagement, and an improper and dishonest carrying on of its affairs.) The declaration concluded with an allegation that by means of the committing of the grievances by the defendant the Company were greatly damaged, injured, and brought into public disgrace and contempt, and the value of the property of the Company and of the shares therein was depreciated.

¹ An act of the legislature, giving an unqualified authority to construct a bridge or dam across a stream, is a justification only with respect to public interests. It gives, by implication, authority to appropriate, without compensation, such portion as is necessary for the purpose of the lands belonging to the State under water. But it affords no protection for a private injury, such as the overflow of lands belonging to the riparian owners, or the building of piers and abutments on lands under water belonging to individuals, without payment or tender of compensation. Gould on Waters, 3d ed. s. 136.

So a charter authorizing a corporation to erect and maintain a dam on their own land across the Merrimack river, while it may protect the corporation from an indictment for a public nuisance in obstructing the river, confers upon the corporation no right to overflow lands of another riparian proprietor without his consent. For such wrongful flowage the riparian proprietor can resort to the common law remedies. He may bring an action, or he may enter and abate the nuisance by removing flush-boards from the dam. *Amoskeag Manuf. Co. v. Goodale*, A. D. 1865, 46 New Hampshire, 53; *Eastman v. Amoskeag Manuf. Co.*, A. D. 1862, 44 New Hampshire, 143, p. 160. — Ed.

Plea — That, before and at the time of the committing of the grievance, the defendant was a shareholder in the Company, and has ever since continued to be, and was at the commencement of this suit, and now is, a shareholder in the said Company.

Demurrer and joinder therein.

Edwards, in support of the demurrer.

[Argument omitted.]

Stammers, in support of the plea.

Secondly, the declaration is also bad on the ground that a quasi corporation can only maintain an action in respect of matters necessarily incident to the purpose for which it was incorporated: *Baine v. The Guardians of the Strand Union*, 8 Q. B. 326. [*Pollock*, C. B. — How are they to obtain redress for an injury done to their business by a libel?] They have a remedy by indictment or criminal information. [*Pollock*, C. B. — That would not repay them the money which they may have lost through the libel.] — Thirdly, if the Company is to be treated as anything more than a trading corporation, there is an entire merger of its personal character. There is no instance of a corporation having maintained an action for libel or slander. *Treby*, arguendo in the case of *The Quo Warranto against the City of London*, 8 How. St. Tr. 1039, 1138, said “a corporation is but a name, an *ens rationis*, a thing, that cannot see or be seen, and indeed is no substance, nor can do or suffer wrong.” Under the Civil law, the ground of action was the *injuria*, the personal insult or contumely offered to the party defamed: Dig. lib. 47, tit. 10, l. 5, § 9, 1 Stark on Slander, xxxi. In like manner, all the definitions of libel in our books describe it as an injury affecting personal character: *The Case de Libellis Famosis*, 5 Rep. 124 b, 2 Hawk. P. C. c. 73, s. 9, *Bell v. Stone*, 1 Bos. & P. 331, Com. Dig. “Libel” (A), Bac. Abr. “Libel.” In *Bradley v. Methwyn*, 2 Selw. N. P. 1039, note, 10th ed., Lord Hardwicke, C. J., observed that “the crime in a libel does not arise merely from the scandal, but from the tendency which it has to occasion a breach of the peace.” A corporation has no character which can be injured by slander. [*Watson*, B., referred to *Williams v. Beaumont*, 10 Bing. 260; 3 Moo. & S. 705.] Moreover, it might happen that the members who recovered the damages were not those who complained of the injury.

Edwards was not called upon to reply.

POLLOCK, C. B. — We are all of opinion that the plea cannot be sustained. That a corporation at common law can sue in respect of a libel there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title through which they lost a great deal of money. It could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it

may. But it would be very odd if a corporation had no means of protecting itself against wrong; and if its property is injured by slander it has no means of redress except by action. Therefore it appears to me clear that a corporation at common law may maintain an action for a libel by which its property is injured. Then, has a corporation created under the 19 & 20 Vict. c. 47 the same power? Though that Act makes the partnership a corporation, Mr. *Stammers* says that this is merely for the purpose of carrying on the business mentioned in it, and that it can only sue in respect of matters necessarily incident to that purpose. But in order to carry on business it is necessary that the reputation of such a corporation should be protected, and therefore in the case of libel or slander it must have a remedy by action. With respect to the question of partnership, that raises a different consideration. An action cannot be brought by several partners against one of them, for a party cannot be both plaintiff and defendant. Then, can a quasi corporation, which as a body may sue other people, maintain an action for libel against one of its own members? There is no doubt that a corporation at common law can sue one of its members for a penalty incurred by breach of a bye-law; and why should not a quasi corporation possess similar powers? Such a corporation may recover a debt from one of its own members — indeed that is a very common form of action, and the money when recovered belongs to the whole body of which the defendant is a member. Then, if a quasi corporation may sue for the recovery of money, surely it must also have the power to protect itself against injury by an action for libel? Upon these grounds I think that the action is maintainable.

MARTIN, B. — I am of the same opinion. This is an action for libel, in which a joint stock company is plaintiff; and it is argued that such an action cannot be maintained. No doubt, in looking into the old books, nothing on the subject will be found; but in modern times there has sprung up a class of corporations which are trading bodies, such as dock and canal companies, and it is no where laid down that such corporations are deprived of the protection of the law in case they are libelled. If so, the Hull Dock Company might be libelled with impunity by one of its members asserting that a dock was in such a state that no vessel could come into it; but there is no pretence for saying that in such case the Company could not sue in respect of the injury done to its trade by the libel. As my Lord said, there may be particular kinds of libel which cannot affect a corporation, but in respect of such libels as are injurious to it an action may be maintained.

[Remainder of opinion omitted.]

[The concurring opinion of WATSON, B., is omitted.]

*Judgment for the plaintiff*¹

¹ " . . . the right of a corporation to sue for a wrong is in general the same as the right of a natural person. The limits to be placed on the application of this rule arise

JOURNAL PRINTING COMPANY, &c. v. MACLEAN.

1894. 25 Ontario, 509.¹

ACTION of libel by a newspaper corporation.

The alleged libellous charges are summarized in the opinion.

At the close of the plaintiffs' evidence the trial Judge withdrew the case from the jury and dismissed the action, on the ground that an action of libel at the suit of a corporation cannot be based upon a charge of corruption.

At the Easter Sittings of the Divisional Court, 1894, the plaintiffs moved to set aside the judgment of non-suit and for a new trial, and the motion was argued before ARMOUR, C. J., and STREET, J., on the 28th May, 1894.

Shepley, Q. C., for the plaintiffs. The charge was that the plaintiffs' newspaper was corrupt, and the non-suit was on the ground that libel would not lie for such a charge against a corporation. The libel, however, was one affecting property, and the action lies. The trial Judge gave too narrow an interpretation to *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87, and *The Mayor, Aldermen, and Citizens of Manchester v. Williams*, (1891) 1 Q. B. 94. I rely on *South Hetton Coal Co. v. North-Eastern News Association*, (1894) 1 Q. B. 133; *Owen Sound Building Society v. Meir*, 24 O. R. 109.

McCarthy, Q. C. (with him *Stuart Henderson*), for the defendant. I do not contend that it was necessary for the plaintiffs to allege special damage. To say of a corporation that it has been guilty of corruption is not actionable *per se*. It is not enough that loss of business may be inferred. A corporation, *quâ* corporation, cannot be guilty of corruption; a corporation cannot sue for defamation of character. I rely on the cases mentioned by counsel for the plaintiffs.

Shepley, Q. C., in reply. The effect of this charge was to diminish profits. It is no matter what word is used, if it involves a charge that affects the business of the plaintiffs. I refer to *Abrath v. North-Eastern R. W. Co.*, 11 App. Cas. 247.

simply from the fact that there are certain things which cannot conceivably be done by a corporation as such." 10 Law Quarterly Review, 103.

In *Mayor, etc., of Manchester v. Williams*, L. R. (1891) 1 Q. B. 94, a municipal corporation brought an action for libel, in charging bribery and corruption. The gist of the charge seems to have been that bribery and corruption existed in two departments of the City Council. One ground of defence was, that the charge was not directed against the corporation, but against individual officers of the corporation. But the court put their judgment for the defendant on the broader ground that no action is maintainable by a corporation for charging it with an offence which it is incapable of committing. DAY, J., said: "The charge in the present case is one of bribery and corruption, of which a corporation cannot possibly be guilty, and therefore, in my opinion, this action will not lie." But compare *Morrison-Jewell Filtration Co. v. Lingane*, A. D. 1895, 19 Rhode Island, 316. — ED.

¹ Statement abridged. — ED.

ARMOUR, C. J. I do not think that this case ought to have been withdrawn from the jury.

[After stating the case and setting out the alleged libels.]

The allegations contained in these words that the plaintiffs' newspaper reported favorably or adversely at ten cents a line, that it was corrupt and prostitute, might well be held by a jury to import the charge that the plaintiffs were in the habit of selling the advocacy of their newspaper, and it might well be held by a jury that such a charge tended to bring the plaintiffs into contempt, and to injure their business, and was therefore a libel.

It was contended that such a charge made against the plaintiffs could not be a libel, because the plaintiffs were a corporation and could not as such be guilty of such a charge.

In *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87, Pollock, C. B., said (p. 90) that a corporation could not sue "in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may;" but he said this by way of illustration, and although no doubt true as to some corporations, it is too wide as to all corporations, and although applicable to a municipal corporation, it cannot be held applicable to a corporation such as the plaintiffs.

Could a charge such as this, if made against the corporation, if such it is, that publishes the *London Times*, that it was in the habit of selling the advocacy of the *Times*, be said not to be a charge tending to bring that corporation into contempt, and not to be a charge tending to injure the business of that corporation, and not to be a libel? The test of the tendency of such a charge would be, what would be its effect on the business of that corporation if it were proved to be true, and could it be said that such effect would not be injurious?

I think that the tendency of such a charge against that corporation could not fail to be injurious to its business, and I think that the charge here might well be held to be injurious to the business of the plaintiffs.

The charge made in this case was clearly a charge in relation to the conduct of the plaintiffs of their business, and was a reflection upon such conduct, and was a libel upon the plaintiffs in the view taken of the law by Lord Esher in *South Hetton Coal Co. v. North-Eastern News Association*, (1894) 1 Q. B. 133; and what is said by Lopes, L. J., in that case is quite applicable to this case: "With regard to the first point (will the action lie by the plaintiffs, who are a corporation?) I am of opinion that, although a corporation cannot maintain an action for libel in respect of anything reflecting upon them personally, yet they can maintain an action for a libel reflecting on the management of their trade or business, and this without alleging or proving special damage."

The injury likely to arise from such a charge as is here made would

be a loss of subscribers for and of purchasers of the plaintiffs' newspaper, and a consequent loss of profits in their business.

In my opinion, there must be a new trial, and the costs of the last trial and of this motion will be costs in the cause to the plaintiffs in any event of the suit.

I refer to *Heriot v. Stuart*, 1 Esp. 437; *Trenton Mutual Life and Fire Ins. Co. v. Perrine*, 3 Zab. 402; *Shoe and Leather Bank v. Thompson*, 23 How. Pr. R. 253; *Knickerbocker Life Ins. Co. v. Ecclesine*, 42 How. Pr. R. 201; *The Mayor, Aldermen, and Citizens of Manchester v. Williams*, (1891) 1 Q. B. 94.¹

HAYDEN, J., IN STATE v. BOOGHER.

1877. 3 *Missouri Appels*, 442, pp. 444, 445.

HAYDEN J. . . . The appellant suggests the question, but appears not much to rely upon the point, whether a corporation, as such, can be the subject of a criminal libel. At the present day there can be no doubt that it may. The reasons why it should are not so numerous as in the case of a natural person, but those which exist are as strong. A very large and important part of the private business of the community is now done under the form of corporations. The reputation of persons who employ this form is as important to them as is to him that of a person who deals in his individual capacity. On the other hand, the public mischief, the danger to good order and to the peace of the community, arises as well from malicious defamation of private corporations as from libelous acts on natural persons. Moreover, as business acts and relations involve moral and personal conduct, it is not merely in reference to their business that persons might be defamed without redress, were libels on private corporations permitted. It would be against the reason of the law, if, under the guise of attacking a mere legal entity, a libeler should be allowed to do a wrong to many which he could not safely perpetrate in reference to an individual. The objection, in truth, arises from conceptions which the different functions now accomplished by the corporate form have rendered obsolete, and we have no hesitation in holding that a person may be criminally prosecuted for libel upon a business corporation. See 2 Bishop's Cr. Law, 6th ed. sec. 934; 2 Whart. Cr. Law, 7th ed. sec. 2540; 23 N. J. Law, 407; 9 Minn. 133.

¹ In a note to 52 *Lawyers' Reports*, Annotated, 325, there is a collection of cases where a corporation has been allowed to maintain an action of libel for a charge imputing immorality in the conduct of the corporate business. In some of these cases nothing was said as to any distinction between a corporate plaintiff and an individual plaintiff. In other cases the decision was based on the ground that the charge would unfavorably affect the property interests and business prosperity of the corporation. — Ed.

[The question of the liability of a charitable corporation for the negligence of its servants does not fall within the scope of the present work.

For conflicting views, compare *Glavin v. R. I. Hospital*, A. D. 1879, 12 R. I. 411; *McDonald v. Mass. General Hospital*, A. D. 1876, 120 Mass. 432; *Benton v. Boston City Hospital*, A. D. 1885, 140 Mass. 13; *Downes v. Harper Hospital*, A. D. 1894, 101 Michigan, 555; *Hearns v. Waterbury Hospital*, A. D. 1895, 66 Conn. 98; *Powers v. Massachusetts Homœopathic Hospital*, A. D. 1901, 109 Fed. Rep. 294; *Currier v. Trustees of Dartmouth College*, A. D. 1900, 105 Fed. Rep. 886; 9 Harvard Law Review, 441; 14 Harvard Law Review, 229. — ED.]

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CHAPTER XIX.

LIABILITY OF CORPORATION FOR CRIMES AND
CONTEMPTS.

ANONYMOUS.

13 *Wm. 3.* 12 *Modern*, 559 (*Case No. 935*).

NOTE: *Per Holt, Chief Justice.* A corporation is not indictable, but the particular members of it are.

THE QUEEN *v.* BIRMINGHAM & GLOUCESTER R. Co.1842. 3 *Queen's Bench (Ad. & Ell. N. S.)* 223.

INDICTMENT, found at the Spring assizes for the county of Worcester, 1840, against a corporation aggregate, the Birmingham and Gloucester Railway Company, for disobedience to an order of justices and an order of sessions confirming it, whereby the defendants, pursuant to certain provisions contained in the statute,¹ incorporating the company, were directed to make certain arches to connect lands which had been severed by the railway. The defendants not coming in to plead under the usual venire, some of the goods of the company were seized under a distringas; and at the Worcester Summer assizes, 1840, two of the directors appeared in court to plead, but the officer of the court refused to receive their plea; and, an application on the subject being made to the learned Judge, (PARKE, B.,) he intimated an opinion that the defendants could appear only by attorney, that they could not appear by attorney at the assizes, and that the only course was to remove the indictment by certiorari into this Court, and that the defendants should plead by attorney there.²

In Hilary term, (January 21st,) 1841, *Whateley* obtained a rule for a certiorari to bring up the indictment; LITTLEDALE, J., observing, on the motion, that he never heard of an indictment against a company for disobedience to an order. In the same term *Whateley* obtained a

¹ 6 & 7 W. 4, c. xiv., local and personal, public.² *Regina v. The Birmingham and Gloucester Railway Company*, 9 C. & P. 469.

rule to show cause why the indictment should not be quashed, as not being maintainable against a corporation. In Trinity term, 1841,¹

Talfourd, Serjt., showed cause, and contended that, although an indictment for misfeasance would not have lain, corporations were indictable for omission of duty.² (The authorities and precedents mentioned were again cited on the argument of the demurrer.) He also urged that the objection taken was no ground for a motion to quash, but might be raised on demurrer, in arrest of judgment, or by writ of error. On this point he cited *Rex v. Cooke*, 2 B. & C. 618.

Whateley, in support of the rule, contended that in all the precedents individuals were pointed out against whom ulterior proceedings could be taken on conviction: here it was not known who composed the company. And that, if the prosecutors demurred and judgment were given against them, they would be concluded.

LORD DENMAN, C. J. As to the proceedings, I do not feel the difficulty so strongly as you put it. We do not, however, wish to decide the point on this motion. We take upon ourselves to say that you may demur; and, if we decide against you, you may plead over.

Per curiam;

Rule discharged.

The defendants appeared in this Court, and demurred: and, the prosecutors having joined in demurrer, the case was argued, in last Hilary term,³ by

Whateley, for the defendants.

But, supposing the defendants to have pleaded and to have been found guilty, no punishment can follow: the judgment for a misdemeanor is that the defendant be fined, et quod idem A. B. capiatur ad satisfaciendum dicto Domino regi de fine prædicto: that is the form in *Fanshawe's Case*, Trem. P. C. 202. 204; and a similar form is used in *Holles' Case*, Trem. P. C. 294. 302. A corporation aggregate cannot be taken; and, supposing it to have no property, there is no punishment that could be enforced; they cannot "be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney; 33 H. 8, Br. Fealty," Bro. Ab. Fealtie & Homage, pl. 15; *The Case of Sutton's Hospital*, 10 Rep. 1 a, 32 b. So in Com. Dig. Franchises, (F 19,) it is said that "process of outlawry does not lie against a corporation aggregate;" "and therefore trespass does not lie against a corporation, but against the particular persons only; for a capias and exigent do not go against a corporation."

[Remainder of argument omitted.]

Talfourd, Serjt., *contra*.

[Argument omitted.]

Cur. adv. vult.

¹ May 27th. Before Lord Denman, C. J., Patteson, Williams, and Wightman, Js.

² Stat. 6 & 7 W. 4, c. xiv., s. 1, enacts that the company may "sue and be sued" by their corporate name; and sect. 120, regulates the form of indictment in prosecutions by them: but the act gives no direction as to indictments against them.

³ Wednesday, January 26th. Before Patteson, Coleridge, and Wightman, Js.

PATTESON, J., in this term, (May 28th,) delivered the judgment of the Court. After stating the indictment, removal by certiorari, appearance, demurrer, and ground of demurrer, his Lordship proceeded as follows.

Upon the argument it was not contended on the part of the company that an action of trespass might not be maintained against a corporation; for, notwithstanding some dicta to the contrary in the older cases, it may be taken for settled law, since the case of *Yarborough v. The Bank of England*, 16 East, 6, in which the cases were reviewed, that both trover and trespass are maintainable: but it was said that an indictment will not lie against a corporation. Only one direct authority was cited for this position; and it is a dictum of Lord Holt in an Anonymous case reported in 12 Mod. 559. The report itself is as follows: "Note: Per HOLT, Chief Justice. A corporation is not indictable, but the particular members of it are." What the nature of the offence was to which the observation was intended to apply does not appear; and as a general proposition it is opposed to a number of cases, which show that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults; Hawk. P. C., B. 1, c. 66, s. 13, Vol. ii. p. 58, 7th. ed.

A corporation aggregate may be liable by prescription, and compelled, to repair a highway or a bridge; Hawk. P. C., B. 1, c. 76, s. 8, c. 77, s. 2, Vol. ii. pp. 156. 258: and in the case of *Rex v. The Mayor, &c. of Liverpool*, 3 East, 86, the corporation were indicted by their corporate name for non-repair of a highway, and, upon argument in this Court, the indictment was held to be defective; but no question was made as to the liability of a corporation to be indicted.

In the case of *Rex v. The Mayor, &c. of Stratford-upon-Avon*, 14 East, 348, the corporation was indicted by its corporate name for a non-repair of a bridge, and found guilty, and upon argument in this Court the verdict was sustained, and no question made as to the liability generally of a corporation to an indictment for breach of a duty cast upon it by law.

Upon the discussion of the question in the present case, the counsel for the company relied chiefly upon the circumstance of the indictment being found at the quarter sessions,¹ where the company could not appear and take their trial, even if so disposed, as a corporation can only appear by attorney, and the appearance at the sessions must be in person. We think there is no weight in this objection. It may indeed impose some difficulty upon the prosecutor, and render his proceeding more circuitous, as he will be obliged to remove the indictment by certiorari into this Court in order to make it effective; but the liability of the corporation is not affected.

In the case of *Rex v. Gardner*, 1 Cowp. 79, it was objected that a corporation could not be rated to the poor, because the remedy by im-

¹ It was so put, hypothetically, in the argument for the defendants.

prisonment upon failure of distress was impossible; but the Court considered the objection of no weight, though it might be that there would be some difficulty in enforcing the remedy.

The proper mode of proceeding against a corporation, to enforce the remedy by indictment, is by distress infinite to compel appearance, after removal by certiorari, as suggested by Mr. Baron PARKE in this very case, reported in 9 Car. & Payne, 469, and as appears by Hawk. P. C., B. 2, c. 27, s. 14, Vol. iv. p. 140, and the cases cited in 6 Vin. Abr. 310, &c., tit. Corporations, (B. a) Vol. iv. p. 140.

We are therefore of opinion that upon this demurrer there must be judgment for the Crown. Judgment for the Crown.

THE QUEEN v. GREAT NORTH OF ENGLAND R. CO.

1846. 9 *Queen's Bench* (Ad. & Ell. N. S.), 315.¹

INDICTMENT against an incorporated railway company for cutting through and obstructing a highway. Plea, not guilty. Issue thereon.

On the trial, before WIGHTMAN, J., at the Durham Spring assizes, 1845, evidence was given, on the part of the prosecution, to show that the Company had cut through a carriage road with the railway, and had carried the road over the railway by a bridge not satisfying the statutory provisions. For the defendants, it was objected that no indictment for a misfeasance could be maintained against a corporation; and as to the first four counts, that the defendants were authorised to cut through the road and erect the bridge, and that, if in doing so, they had not complied with the statutory provisions, they ought to have been indicted for breach of those provisions.² Other objections were taken to the last five counts, which it is unnecessary to state. A verdict was found for the Crown on all the counts, leave being reserved to move to enter a verdict for the defendants, or to arrest the judgment.

In Easter term, 1845, *Wortley* obtained a rule accordingly. In this term,³

Granger, *Otter*, and *Bovill* showed cause.

Knowles, *Bliss*, and *Joseph Addison*, contra.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

The question is, whether an indictment will lie at common law against a corporation for a misfeasance, it being admitted, in conformity with

¹ Statement abridged. Arguments omitted. — ED.

² The argument, as to this point, in banc, is omitted in the report, the Court having pronounced no express decision upon it: *Regina v. Scott*, 3 Q. B. 543, was referred to.

³ Tuesday, May 26th, and Monday, June 8th. Before Lord DENMAN, C. J., PATTERSON, and WIGHTMAN, Js.

undisputed decisions, that an indictment may be maintained against a corporation for nonfeasance.

All the preliminary difficulties, as to the service and execution of process, the mode of appearing and pleading, and enforcing judgment, are by this admission swept away. But the argument is, that for a wrongful act a corporation is not amenable to an indictment, though for a wrongful omission it undoubtedly is; assuming, in the first place, that there is a plain and obvious distinction between the two species of offence.

No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in providing safeguards or to an act rendered improper by nothing but the want of safeguards. If A. is authorized to make a bridge with parapets, but makes it without them, does the offence consist in the construction of the unsecured bridge, or in the neglect to secure it?

But if the distinction were always easily discoverable, why should a corporation be liable for the one species of offence and not for the other? The startling incongruity of allowing the exemption is one strong argument against it. The law is often entangled in technical embarrassments; but there is none here. It is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission.

Some dicta occur in old cases: "A corporation cannot be guilty of treason or felony." It might be added "of perjury, or offences against the person." The Court of Common Pleas lately held that a corporation might be sued in trespass, *Maund v. The Monmouthshire Canal Company*, 4 M. & G. 452; but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, cannot be guilty in these cases; but they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large. The late case of *Regina v. Birmingham and Gloucester Railway Company*, 3 Q. B. 223, was confined to the state of things then before the Court, which amounted to nonfeasance only; but was by no means intended to deny the liability of a corporation for a misfeasance.

We are told that this remedy is not required, because the individuals who concur in voting the order, or in executing the work, may be made answerable for it by criminal proceedings. Of this there is no doubt. But the public knows nothing of the former; and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual

means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation, acting by its majority: and there is no principle which places them beyond the reach of the law for such proceedings.

The verdict for the Crown, therefore, on the first four counts, will remain undisturbed.

Judgment to be entered on the first four counts; arrested on the others.

UNITED STATES v. JOHN KELSO COMPANY.

1898. 86 *Federal Reporter*, 304.

IN U. S. District Court for the Northern District of California.

DE HAVEN, District Judge. On October 9, 1897, there was filed in this court by the United States district attorney for this district, an information charging the defendant, a corporation, with the violation of "An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," approved August 1, 1892 (2 Supp. Rep. St. p. 62). Upon the filing of this information, the court, upon motion of the district attorney, directed that a summons in the general form prescribed by section 1390 of the Penal Code of this state, be served upon said corporation, and accordingly on said date a summons was issued, directing the defendant to appear before the judge of said court in the court room of the United States district court for this district on the 21st day of October, 1897, to answer the charge contained in the information. The summons stated generally the nature of the charge, and for a more complete statement of such offence referred to the information on file. On the day named in said summons for its appearance, the defendant corporation appeared specially by its attorney, and moved to quash the summons, and to set aside the service thereof, upon grounds hereinafter stated. Upon the argument of this motion, it was claimed in behalf of the defendant: First, that the act of congress above referred to does not apply to corporations, because the intention is a necessary element of the crime therein defined, and a corporation as such is incapable of entertaining a criminal intention; second, that, conceding that a corporation may be guilty of a violation of said act, congress has provided no mode for obtaining jurisdiction of a corporation in a criminal proceeding, and for that reason the summons issued by the court was unauthorized by law, and its service a nullity. It will be seen that the first objection goes directly to the sufficiency of the information, and presents precisely the same question as would a general demurrer,

attacking the information on the ground of an alleged failure to charge the defendant with the commission of a public offence. This objection is one which would not ordinarily be considered upon a motion like that now before the court, when the party making the objection refuses to acknowledge the jurisdiction of the court, or to make any other than a special appearance for the purpose of attacking its jurisdiction; but, in view of the conclusion which I have reached upon the second point urged by the defendant, it becomes necessary for me to determine whether the act of congress above referred to is applicable to a corporation, and whether a corporation can be guilty of the crime of violating the provisions of said act. Section 1 of that act makes it unlawful for a contractor or subcontractor upon any of the public works of the United States, whose duty it shall be to employ, direct, or control the services of laborers or mechanics upon such public works, "to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency." And section 2 of the act provides "that . . . any contractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any public works of the United States . . . who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every offence shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof." It will be observed that by the express language of this statute there must be an intentional violation of its provisions, in order to constitute the offence which the statute defines. In view of this express declaration, it is claimed in behalf of defendant that the act is not applicable to corporations, because it is not possible for a corporation to commit the crime described in the statute. The argument advanced to sustain this position is, in substance, this: That a corporation is only an artificial creation, without animate body or mind, and therefore, from its very nature, incapable of entertaining the specific intention which, by the statute, is made an essential element of the crime therein defined. The case of *State v. Great Works M. & M. Co.*, 20 Me. 41, supports this proposition, and it must be conceded that there are to be found dicta in many other cases to the effect that a corporation is not amenable to prosecution for a positive act of misfeasance, involving a specific intention to do an unlawful act. In a general sense, it may be said that no crime can be committed without a joint operation of act and intention. In many crimes, however, the only intention required is an intention to do the prohibited act, — that is to say, the crime is complete when the prohibited act has been intentionally done; and the more recent and better considered cases hold that a corporation may be charged with an offence which only involves this kind of intention, and may be properly convicted when, in its corporate capacity, and by direction of those controlling

its corporate action, it does the prohibited act. In such a case the intention of its directors that the prohibited act should be done is imputed to the corporation itself. *State v. Morris E. R. Co.*, 23 N. J. Law, 360; *Reg. v. Great North of England Ry. Co.*, 58 E. C. L. 315; *Com. v. Proprietors of New Bedford Bridge*, 2 Gray, 339. See, also, *State v. Baltimore & O. R. Co.*, 15 W. Va. 380. That a corporation may be liable civilly for that class of torts in which a specific malicious intention is an essential element is not disputed at this day. Thus an action for malicious prosecution will lie against a banking corporation. *Reed v. Bank*, 130 Mass. 434; *Goodspeed v. Bank*, 22 Conn. 530. An action will lie also against a corporation for a malicious libel. *Railroad Co. v. Quigley*, 21 How. 202; *Maynard v. Insurance Co.*, 34 Cal. 48. The opinion in the latter case, delivered by Currey, C. J., is an able exposition of the law relating to the liability of corporations for malicious libel, and in the course of which that learned judge, in answer to the contention that corporations are mere legal entities existing only in abstract contemplation, utterly incapable of malevolence, and without power to will good or evil, said:

"The directors are the chosen representatives of the corporation, and constitute, as already observed, to all purposes of dealing with others, the corporation. What they do within the scope of the objects and purposes of the corporation, the corporation does. If they do any injury to another, even though it necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong, and answerable for it, as an individual would be in such case."

The rules of evidence in relation to the manner of proving the fact of intention are necessarily the same in a criminal as in a civil case, and the same evidence which in a civil case would be sufficient to prove a specific or malicious intention upon the part of a corporation defendant would be sufficient to show a like intention upon the part of a corporation charged criminally with the doing of an act prohibited by the law. Of course, there are certain crimes of which a corporation cannot be guilty; as, for instance, bigamy, perjury, rape, murder, and other offences, which will readily suggest themselves to the mind. Crimes like these just mentioned can only be committed by natural persons, and statutes in relation thereto are for this reason never construed as referring to corporations; but when a statute in general terms prohibits the doing of an act which can be performed by a corporation, and does not expressly exempt corporations from its provisions, there is no reason why such statute should be construed as not applying to them, when the punishment provided for its infraction is one that can be inflicted upon a corporation, — as, for instance, a fine. In the act of congress now under consideration it is made an offence for any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer employed upon any of the public works of the United States, to require or permit such laborer to work

more than eight hours in any calendar day. A corporation may be a contractor or subcontractor in carrying on public works of the United States, and as such it has the power or capacity to violate this provision of the law. Corporations are, therefore, within the letter, and, as it is as much against the policy of the law for a corporation to violate these provisions as for a natural person so to do, they are also within the spirit of this statute; and no reason is perceived why a corporation which does the prohibited act should be exempt from the punishment prescribed therefor. If the law were capable of the construction contended for by the defendant, the result would be that a corporation, in contracting for the doing of any public work, would be given a privilege denied to a natural person. Such an intention should not be imputed to congress, unless its language will admit of no other interpretation.

[The learned Judge further *held*, that jurisdiction was properly obtained by the service of a summons. "The court, having general jurisdiction to try the defendant for its alleged violation of the law under consideration, may, as a necessary incident to such jurisdiction, issue any appropriate writ for the purpose of bringing the defendant before it to answer such charge." See 65 Calif. 644; 6 Wallace, 166; U. S. Revised Statutes, s. 716; 32 New Hampshire, 215, pp. 228-234.]

Motion of defendant denied.

FAULK v. CURTIS PUB. CO.

1900. 98 *Federal Reporter*, 989.¹

[ACTION to recover penalties under Section 4965, U. S. Revised Statutes.

The statute provides that, if "any person," after the recording of the title of any map, etc., shall, without the written consent of the proprietor of the copyright, sell or expose to sale any copy of such map, he shall forfeit to the proprietor all the plates and sheets, "and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; . . . one half thereof to the proprietor, and the other half to the use of the United States."

Plaintiff sought to recover of defendant the penalty imposed upon "any person" for every sheet "found in his possession."]

DALLAS, Circuit Judge. The defendant has assigned 10 reasons in support of its demurrer to the plaintiff's statement of claim:

2 and 3. The brief for the defendant states that paragraphs 2 and 3 of the demurrer set up the proposition "that this penalty can only

¹ Only so much of the opinion is given as relates to a single point. — *Ed.*

be incurred by a natural person in whose actual possession infringing copies can be, and have been, found prior to suit brought, and cannot be enforced against a corporation." This proposition has been earnestly and ably enforced by argument, but it cannot be sustained. It is unquestionably true that section 4965 of the Revised Statutes, upon which this action is founded, is a rigorously penal one, and therefore should be strictly construed. But the construction which the defendant invokes is not merely restrictive, — it is discriminative; and the real question is whether the Congress intended, in using the words "any person," to discriminate between two sorts of persons (natural and artificial) equally well known, and both recognized by law. No reason has been suggested which could have induced such an intent, and to me it seems that to ascribe to Congress a purpose to exempt corporations from, while subjecting natural persons to, the penalties imposed by this section, would be to assume that it purposed a manifestly unreasonable consequence; and of this the court should not be persuaded, except by clear and unequivocal expression. 1 Shars. Bl. Comm. p. 90, and note by Christian. But Congress has distinctly declared its intent to the contrary; for the first section of the Revised Statutes prescribes that:

"In determining the meaning of the Revised Statutes, . . . the word 'person' may extend and be applied to partnerships and corporations, . . . unless the context shows that such words were intended to be used in a more limited sense."

Although this defining provision is, in my opinion, conclusive of the question, yet I have examined the cases referred to in supposed support of the defendant's position, but without finding that they tend to sustain it. The case of *Androscoggin Water Power Co. v. Bethel Steam Mill Co.*, 64 Me. 441, arose under a state statute which created a criminal offence and also imposed a civil liability; and it was held that "the intent with which the act prohibited is done" was, under that statute, the essential subject of inquiry either in the criminal or in the civil proceeding which it contemplated, and that the intent meant "is individual, not corporate, intent." But it was there said:

"While, undoubtedly, the word 'person' may include a body corporate, we do not think that it was the legislative intention that in the act under consideration it should do so. The fair and natural construction to be given to the language used negatives any such idea."

That case is plainly distinguishable from this one.

In *State v. Cincinnati Fertilizer Co.*, 24 Ohio St. 611, a corporation was indicted under an act of the legislature for erecting and keeping up a nuisance. Nothing was decided which is applicable here, but only that, in view of the state of legislation and practice in the state of Ohio, the whole theory and machinery of whose administration of criminal law seems adapted only to the prosecution and punishment of natural persons, the legislature could not have intended in the use of the word "person," which is found in almost every criminal law of



the state, to authorize an indictment against a corporation for this particular offence, without any special or further provision as to the liability of corporations or the mode of proceeding against them.

Benson v. Manufacturing Co., 9 Metc. (Mass.) 562, was decided under a statute which by its express terms made the agents or superintendents of manufacturing establishments liable to the penalties which it imposed; and it was in view of this provision that the court held that, inasmuch as every case may be reached without applying the penalties to corporate bodies, and sustaining actions against them in their corporate name for breach of this statute, an action against such corporate bodies in their corporate name could not be sustained. The court, however, said:

"They [corporations] may be said to be embraced in the word 'owner' of any manufacturing establishment; and if the provision had been thus limited, and no penalty imposed on other persons than the owners of establishments, it would perhaps have been a reasonable construction, and necessary to give force and effect to the statute, to the extent designed, to have held the corporation liable under the description of 'owner.'"

The authorities which show that under certain circumstances there can be no recovery against the master of a penalty or of damages which the law visits upon the actual wrongdoer, the servant, by way of punishment only, and not for the purpose of compensating the injured party, need not be particularly considered. The charge in this case is against the corporation itself, and a corporation aggregate is but a bundle of agents. As an abstract entity it is incapable of action, but, whatever may at one time have been supposed to be the law, it is now well settled that a corporate body is liable to substantially the same extent as a natural person for the wrongful acts of its officers and agents committed on its behalf, and for its benefit, in the course of their office or employment. "The true rule is that corporations are to be considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly embodied in the statute." *Stewart v. Turn Verein*, 71 Iowa, 226, 32 N. W. 275. Nothing need be added to show that copies can be found in the actual possession of an artificial person as well as of a natural person. It results from what has already been said that the possession of agents of a corporation, who in that behalf are its representatives, is the possession of the corporation itself. The second and third paragraphs of the demurrer cannot be sustained.

[Remainder of opinion omitted.]

TELEGRAM NEWSPAPER CO. v. COMMONWEALTH.

1899. 172 *Massachusetts*, 294.¹

WRIT of error to reverse a judgment of the Superior Court.² Plaintiff is a corporation publishing a newspaper in Worcester. While the case of *Loring v. Town of Holden* was on trial before the Superior Court at Worcester, the Daily Telegram published the following statement: "The town offered Loring \$80 at the time of taking, but he demanded \$250, and, not getting it, went to law." A summons to the plaintiff was issued by the Superior Court, of its own motion, to show cause why the corporation should not be adjudged in contempt for publishing an article dealing with a matter on trial before the court. The record of the proceeding in the contempt case, after setting out the summons, service, the appearance of the corporation and the hearing, concludes as follows: "When, after hearing all matters and things concerning said publication by said respondents, it appearing to said court that said article was calculated to obstruct the course of justice in said court and prevent a fair trial of said case, and that it was a contempt of said court for said corporation to publish the said article during the said trial, it was therefore ordered by said court that said respondent corporation be adjudged guilty of contempt of said court for said publication of said article, and it was thereupon ordered by said court that said respondent corporation pay a fine of \$100, and it was further ordered that, if said fine be not paid within twenty-four hours, an execution be issued against said respondent corporation for the collection of said fine by a levy on its property."

F. P. Goulding (*W. C. Mellish* with him), for plaintiff in error.

H. Parker and *G. S. Taft*, for Commonwealth.

FIELD, C. J. [After stating the case.] It is contended that a corporation cannot be guilty of a criminal contempt of court although it may be fined for what is called a civil contempt. It is said that an intent cannot be imputed to a corporation in criminal proceedings. It has been decided in this Commonwealth that a corporation may be liable civilly for a libel or a malicious prosecution. *Fogg v. Boston & Lowell Railroad*, 148 Mass. 513. *Reed v. Home Savings Bank*, 130 Mass. 443. We think that a corporation may be liable criminally for certain offences of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings, than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings, but its property may be taken either as compensation for a private wrong or as punishment for a public wrong. In most of the States of this country corporations may be formed under general laws for the

¹ Statement abridged from opinion. — ED.

² A similar writ of error by the *Gazette Company* was heard at the same time. — ED.

purpose of doing almost any kind of business as easily as partnerships, and many of the newspapers are published by corporations. Although natural persons who publish or assist in publishing a libel in a newspaper owned by a corporation may be punished criminally by fine or imprisonment, or both, yet if the corporation cannot be punished by a fine it will escape all criminal liability. The authors of libels are often irresponsible persons, and the remedy by private action against corporations for the publishing of libellous statements is often inadequate. That a corporation may be indicted for a misfeasance as well as for a nonfeasance has been decided in this Commonwealth. *Commonwealth v. New Bedford Bridge*, 2 Gray, 339. See *The Queen v. Great North of England Railway*, 9 Q. B. 315, 326. A corporation may be indicted for a libel. *State v. Atchison*, 3 Lea, 729; *S. C.* 31 Am. Rep. 663, and note. *Brennan v. Tracy*, 2 Mo. App. 540. *Pharmaceutical Society v. London & Provincial Supply Association*, 5 App. Cas. 857, 869, 870. 2 Bish. New Crim. Law, § 935, Newell, Slander & Libel (2d ed.) 362, 363. Odgers, Libel & Slander, (3d ed.) 436. Thompson, Corp. §§ 6418 *et seq.*

The publication of an article in a newspaper which is printed and circulated in the place where a trial is had pending the trial, and which concerns the cause on trial and is calculated to prejudice the jury in the cause and prevent a fair trial, often has been held to be a criminal contempt of the court trying the cause. *O'Shea v. O'Shea*, 15 P. D. 59. *Ex parte Green*, 7 Times Law Rep. 411. *Daw v. Eley*, L. R. 7 Eq. 49, 55. *Ramsbotham v. Senior*, L. R. 8 Eq. 575. *People v. Wilson*, 64 Ill. 195. *In re Sturoc*, 48 N. H. 428. *In re Cheeseman*, 10 Vroom, 115, 137. *State v. Frew*, 24 W. Va. 416. Oswald, Contempt of court, (2d ed.) 58 *et seq.* 7 Am. & Eng. Encyc. of Law, (2d ed.) 59. If a corporation publishes the article, we see no reason why it should not be held liable for a criminal contempt. Thompson, Corp. §§ 6448 *et seq.* 7 Am. & Eng. Encyc. of Law, (2d ed.) 847 and cases cited.

[After discussing the power to punish for contempt, and the method of procedure.]

The most important question is whether the publication of these articles under the circumstances stated could be adjudged a contempt. The articles published were not defamatory, either as regards the presiding justice of the court or the jurors before whom the cause referred to was being tried, or the parties to the cause. In one case the court discharged the treasurer and manager of the newspaper, and in the other the editor and the publisher, on the ground that they were not shown to be directly responsible for the publications. It is probable, although this does not expressly appear in the papers before us, that the person or persons employed to report for each newspaper the proceedings of the court wrote the articles and caused them to be published. The Superior Court has not found that there was an intent to influence the trial of the cause referred to on the part of anybody.

The articles are objectionable only because they purport to state the amount of money which the town offered to pay the plaintiff, and the amount the plaintiff demanded before the petition was brought. The law encourages attempts to settle or compromise disputes without subjecting the parties to any liability, if the attempts fail, of having any concessions therein made to avoid litigation put in evidence against them in the subsequent litigation. *Upton v. South Reading Branch Railroad*, 9 Cush. 600. *Harrington v. Lincoln*, 4 Gray, 563. *Gay v. Bates*, 99 Mass. 263. *Draper v. Hatfield*, 124 Mass. 53. We are content to assume that the person or persons who wrote and caused the articles to be published did not know this rule of law, and acted without any intent to pervert the course of justice. As the only intent which can be imputed to the corporations is the intent of its officers or agents, the question is whether the publication of these articles without any intent to pervert the course of justice can be adjudged a contempt. In *Metropolitan Music Hall Co. v. Lake*, 58 L. J. (N. S.) Ch. 513, it is said that it must be shown that the articles were published with knowledge of the pending cause, and that appears in the present cases.

In *Cartwright's Case*, *ubi supra*, it is said by the court: "But the jurisdiction and power of the court do not depend upon the question whether the offence might or might not be punished by indictment. . . . 'As regards the question whether a contempt has or has not been committed, it does not depend upon the intention of the party, but upon the act he has done.' By Taney, C. J., in *Wartman v. Wartman*, Taney, 362, 370." If a person talk with or send a statement to a juror about a cause, during the trial of it, in such a manner that it may cause prejudice or bias in the cause, although the intent with which the person acted may affect the amount of his punishment, he cannot justify his conduct by showing that he had no evil intent, and knew no better.

It was not necessary that the Superior Court should find that the articles published actually had been read by some of the jurors while trying the cause to which the articles referred. They plainly had been read by the presiding justice during the trial, and it was likely that they had been read by some of the jurors. The intention of the publisher of a newspaper is that it should be bought and read by persons within the place where it circulates. Cases before a court should be determined on evidence presented in court. It is an inevitable perversion of the proper administration of justice to attempt to influence the judge or jury in the determination of a cause pending before them by statements outside of the court room, and not in the presence of the parties, which may be false, and even if they are true are in law not admissible as evidence.

We cannot say that it appears that the Superior Court erred in adjudging that the publication of these articles, under the circumstances stated, was a contempt of that court, and it was for that court

to determine whether it was necessary to institute proceedings for contempt in order to vindicate its authority to secure the due administration of justice in a cause pending before it. The publications contained statements of facts, evidence of which was not competent at the trial and was not introduced at the trial, and they were so made that it was likely that the presiding justice and the jurors would read them during the trial, and the natural and probable effect of them would be improperly to influence the justice and the jury in the determination of the cause.

The proper method of collecting a fine imposed upon a corporation is by a levy of an execution issued by the court. *The King v. Woolf*, 2 B. & Ald. 609; *S. C.* 1 Chitty, 583. *Huddleson v. Ruffin*, 6 Ohio St. 604. 1 Chitty, *Crim. Law* (2d ed.), 811. 1 Bish. *New Crim. Proc.* §§ 1303 *et seq.*

Judgments affirmed.

¹ [As to the power to punish a corporation for contempt in disobeying an injunction order in a civil case, see *People v. Albany & Vermont R. Co.*, A. D. 1860, 12 *Abbott's Practice Reports* (New York), 171. — ED.]

CHAPTER XX.

EFFECT OF ULTRA VIRES TRANSACTIONS.

[THE expression *ultra vires* is used in different senses — to express either that the act of the directors or officers is in excess of their authority as agents of the corporation, or that the act of the majority of the stockholders is in violation of the rights of the minority, or that the act has not been done in conformity with requirements of the charter, or that the act is one that the corporation itself has not the capacity to do, as being in excess of its corporate powers.¹

The indiscriminate use of this expression, with respect to cases different in their nature and principles has led to considerable confusion, if not misapprehension. Where the act done by directors or officers is simply beyond the powers of the executive department of the corporation as the agency by which the corporation exercises its functions, and not of the corporation itself, it may be made valid and binding by the action of the board of directors, or by the approval of the stockholders. Where the act done by stockholders is not in excess of the powers of the corporation itself, but is simply an infringement upon the rights of other stockholders, it may be made binding upon the latter by ratification or by consent implied from acquiescence. Where the infirmity of the act does not consist in a want of corporate power to do it, but in the disregard of formalities prescribed, it may or may not be valid as to third persons dealing *bonâ fide* with the corporation, according to the nature of the formality not observed, or the consequences the legislature has imposed upon non-observance. These are all cases depending upon legal principles, not peculiarly applicable to corporations, and the use of the phrase *ultra vires* tends to confusion and misapprehension. In its legitimate use, the expression *ultra vires* should be applied only to such acts as are beyond the powers of the corporation itself.]

DEPUE, J., in *Camden & Atlantic R. R. Co. v. Mays Landing, &c.*, R. R. Co., A. D. 1886, 48 New Jersey Law, 530, pp. 574, 575.

¹ The expression is also used to describe an act which is "illegal" for reasons other than the mere lack of legislative authority in the corporation to do the act; i. e., where the act is forbidden by some statute or rule of law other than the general rule that corporations shall not exceed the authority granted them by the State. — Ed.

SECTION I.

Transaction within the apparent Authority of the Corporation, and rendered Ultra Vires only by Reason of the Purpose entertained by the Corporation, or by other extrinsic Facts.

MONUMENT NAT'L BANK v. GLOBE WORKS.

1869. 101 Mass. 57.

HOAR, J. The single question presented for our decision in this cause, all others which arise upon the report having been waived, is, whether the note of a manufacturing corporation, in the hands of a holder in good faith for value, who took it before maturity, and without any knowledge that the makers had not received the full consideration, cannot be enforced against them, because it was in fact made as an accommodation note.

The argument for the defendants takes the ground that to issue an accommodation note is not within the powers conferred upon the corporation; and that, as any persons taking it had notice that it was the note of the corporation, they had notice that it was of no validity unless issued for a purpose within the scope of the corporate powers, and were therefore bound to ascertain not only that it was executed by the officer of the corporation who had the general authority to sign the notes which they might lawfully make, but that the purpose for which it was issued was such as the charter authorized them to entertain and execute.

The court are all of opinion that this position is not tenable, and that the defence cannot be maintained.

It has long been settled in this Commonwealth that a manufacturing corporation has the power to make a negotiable promissory note. *Naragansett Bank v. Atlantic Silk Co.* 3 Met. 282. And it was held in *Bird v. Daggett*, 97 Mass. 494, as a just corollary to that proposition, that such a note in the hands of a holder in good faith for value is binding upon the maker, although made as an accommodation note. The question was not discussed, nor the reasons for the decision fully stated, in *Bird v. Daggett*; but it was assumed that the doctrine announced was clear and undoubted law.

The doctrine of *ultra vires* has been carried much farther in England than the courts in this country have been disposed to extend it; but, with just limitations, the principle cannot be questioned, that the limitations to the authority, powers and liability of a corporation are to be

found in the act creating it. And it no doubt follows, as claimed by the learned counsel for the defendants, that when powers are conferred and defined by statute, every one dealing with the corporation is presumed to know the extent of those powers.

But when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply. As was said by Selden, J., in *Bissell v. Michigan Southern & Northern Indiana Railroad Co.* 22 N. Y. 289, 290: "There are no doubt cases in which a corporation would be estopped from setting up this defence, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bonâ fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. When the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defence of *ultra vires* is available against him. But such a defence would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract, it had virtually affirmed."

This doctrine seems to us sound and reasonable; and in conformity with it, it was held in *Farmers' & Mechanics' Bank v. Empire Stone Dressing Co.* 5 Bosw. 275, that an accommodation acceptance by an officer of a manufacturing corporation, on behalf of the company, was not binding, unless the consideration had been advanced upon the faith of the acceptance; but that if the consideration was paid in good faith after the acceptance, and upon the credit of it, it could be enforced.

So it was said by Lord St. Leonards that he felt a disposition "to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation, and of the contract entered into." *Eastern Counties Railway Co. v. Hawkes*, 5 H. L. Cas. 331, 373.

The cases on which the defendants rely are cases against municipal corporations, in respect to which the rule is much more rigid, or for the

most part those in which the other contracting party had notice upon the face of the transaction of the want of corporate power.

There can be no doubt that it is very often true that a corporation may be responsible for the unauthorized, and even for the unlawful acts of its agents, apparently clothed with its authority. No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable, in this Commonwealth, for one committed by its servants. Bills of a bank issued without consideration, and even stolen, are good in the hands of an innocent holder for value. Many other illustrations might be given, but enough has been said to show the principle on which our decision rests.

Judgment for the plaintiffs.

R. H. Dana, Jr., & T. K. Lothrop, for the defendants.

C. A. Welch & W. W. Warren, for the plaintiffs.

SECTION II.

*Executed Transfers to, or from, Corporation in Excess of
Charter Authority.*

LEAZURE v. HILLEGAS.

1821. 7 *Sergeant & Rawle (Pa.)*, 313.¹

ERROR to the Common Pleas of Bedford County.

Frederick Hillegas, the plaintiff below, (who is defendant in error), claimed the land in dispute under a warrant and survey to *Thomas Holt*, who conveyed to *George Armstrong*, who conveyed to *William Henry*, who conveyed to the *Bank of North America*, who conveyed to *James Ross*, who conveyed to the *Plaintiff*. On the trial several exceptions were taken to the opinion of the Court on points of evidence.

Tod, for plaintiff in error.

J. Riddle and *Thompson*, for defendant in error.

TILGHMAN, C. J.

The third exception was, to the admission of the deed from the *Bank of North America* to *James Ross*, to which there were two objections, first, that there was no evidence of the seal of the corporation; and second, that the corporation was incapable of receiving a conveyance of land, otherwise than by mortgage, and therefore had no estate which could be conveyed. The first exception [objection] was good.

But the great points in this cause are, the capacity of the bank to take the land conveyed by *William Henry's* deed, and afterwards to convey the same to *James Ross*. There is no doubt that a corporation must be governed by the charter, from which it derives its existence. It can do no act nor take any estate contrary to its charter. If therefore it can be shown, that the *Bank of North America*, is forbidden by its charter, either to take, or to convey, the land contained in *William Henry's* deed, the plaintiff's action cannot be supported. By the 3d section of the Act of Incorporation, (17th of *March*, 1787, 2 *Sm. L.* 399,) the bank is made capable "to have, hold, purchase, receive, possess, enjoy, and retain, lands, rents, tenements, goods, chattels, and effects of whatsoever kind, nature or quality, to the amount of two millions of dollars and no more, and also to sell, grant, &c. the same lands, &c. Provided nevertheless, that such lands and tenements, which the said corporation are hereby enabled to purchase and hold,

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

shall only extend to such lot and lots of ground, and convenient buildings, and improvements thereon erected or to be erected, which they may find necessary and proper for carrying on the business of the said bank, and shall actually occupy for that purpose, *and to such lands and tenements which are or may be bona fide mortgaged to them as securities for their debts.*" It is remarkable, that with regard to the *holding* of lands, the charter of this bank is more restricted than that of any other bank in the State, for all the others are enabled to hold, not only the lands which have been *bona fide* mortgaged to them by way of security for debts, but also those, "which may be conveyed to them in satisfaction of debts previously contracted in the course of their business, or purchased at sales upon judgments which shall have been obtained for such debts." This difference of restriction, must have arisen from the extreme jealousy of monied corporations which pervaded the mind of the Legislature when the *Bank of North America* was incorporated. It never could have been intended to place that bank on a worse footing than others, for it was the only one, which risked its capital on a field altogether untried in *America*, and which had the merit of rendering essential service to the *United States*, during the war of the revolution. It would be improper therefore, to carry the restriction, *by construction*, farther than the words of the law plainly import. The restriction is, that the bank shall not *purchase and hold*. *Purchasing and holding*, are very different things, and the consequences of each are very different. If the words had been, that the bank should neither purchase nor hold, then it could have done neither one nor the other. But although *purchasing and holding* might have been thought dangerous, because of the power which it would have given the bank to bring too much land into *mortmain*, yet to *purchase*, subject to the statutes of *mortmain*, which authorised the Commonwealth to appropriate the land to its own use, could be attended with no danger. This construction would satisfy the jealous policy of the Legislature, preserve the community from the danger of too great a mass of real property held in *mortmain*, and at the same time put it in the power of the Commonwealth to act towards the bank, as justice might seem to require. This is a consideration of no small importance ; for when the directors of the bank accepted from *William Henry*, a conveyance of his land at a fair price, in payment of a debt *bona fide* due, it would be hard to presume, that they knew they were acting in violation of their charter. But granting that the restriction in the charter, did not extend to the simple act of *purchasing*, it may be asked, whence did the corporation derive the *right to purchase*, and what would be the situation of land purchased, without a capacity of holding. The answer is, that a corporation has, *from its nature*, a right to *purchase* lands, though the charter contains no license to that purpose. And in this respect the statutes of *mortmain* have not altered the law, except in case of *superstitious uses*. But since those statutes, it is necessary, in order to enable a corporation to *retain*

lands which it has purchased, to have a license for that purpose ; otherwise, in *England*, the next lord of the fee may enter within a year after the alienation, and if he do not, then the next immediate lord, from time to time, has half a year to enter, and for default of all the *mesne* lords, the king takes the land so aliened, for ever. That this is the law appears from the following authorities. 2 *Black. Com.* 268, 269. *Co. lit.* 2. 6 *Vin. Ab.* 265. (*G. pl.* 2.) *id.* 266. *pl.* 8. *Jenk. Cent.* 270. 3 *Com. Dig.* 399. (*F.* 10.) *id.* 401. (*F.* 15.) 1 *Roll. Ab.* 513. 1. 35. 10 *Co.* 30. But in *Pennsylvania*, where there are no *mesne* lords, the right would accrue immediately to the Commonwealth. It has been objected however, that according to the report of the Judges of this Court, made on the 14th *December*, 1808, in pursuance of an Act of Assembly requiring them to make a report of the *English* statutes which are in force in the Commonwealth, &c., it appears, that all conveyances of land to a corporation, without license, are absolutely void. I will consider this objection. The Judges reported the following statutes of mortmain, “ 7 *Ed.* I. (*Stat.* 2.) 13 *Ed.* I. *ch.* 32. 15 *Rich.* II. *ch.* 5, and 23 *Hen.* VIII. *ch.* 10 ; which are in part inapplicable to this country, and in part applicable, and in force. They are so far in force, that all conveyances by deed or will, of lands, tenements, or hereditaments, made to a body corporate, are void, unless sanctioned by charter or Act of Assembly. So also are all such conveyances void, made either to an individual, or to any number of persons associated, but not incorporated, if the said conveyances are for uses or purposes of a *superstitious* nature, and not calculated to promote objects of charity or utility.” I have quoted the words of the report, and it is evident that the Judges could have no intent, nor had they power to make any addition to the statutes, or in any manner to alter them. Now by reference to the statutes, it will appear, that in all of them, except the 23 *Hen.* VIII. *ch.* 10 ; the conveyance is not absolutely void, but the estate passes to the corporation, subject as before mentioned, to the right of the several *mesne* lords, and in their default, of the king, to enter and hold in fee. But by the statute of 23 *Hen.* VIII. *ch.* 10, (which has been determined to extend to *superstitious uses only*, see 2 *Black. Com.* 273. 1 *Co. Rep.* 24,) uses and trusts, made and contrived in favour of religious persons, or any bodies corporate, for more than twenty years, shall be utterly void. Now the meaning of the report of the Judges is, that, according to the statute cited by them, conveyances to *superstitious* uses, are absolutely void, and conveyances to corporations, to uses *not superstitious*, are so far void, that those corporations shall have no capacity to hold the estates for their own benefit, but subject to the right of the Commonwealth, who may appropriate them to its own use at pleasure ; in other words, that such conveyances have no validity for the purpose of enabling the corporation to hold in mortmain. But to support the plaintiff's title, it must be shewn that the corporation had power, not only to take by purchase, but to *alien*. In this respect I consider a corporation in the

situation of an alien, who has power to take, but not to hold. That an alien may take by purchase, (though not by descent,) has been settled from the earliest times. It is so laid down in *Co. Lit.* 2, and I believe has never been questioned. Neither has it been questioned, that the land is subject to forfeiture, and may be seised for the king, after office found. But it has been questioned, what is the right of the alien before office found for the king. Without reference to *English* cases, which leave the matter in doubt, we have the highest authority in our own country for saying, that until some Act done by the Commonwealth according to its own laws, to vest the estate in itself, it remains in the alien, who may convey it to a purchaser, but he can convey no estate which is not defeasible by the Commonwealth. This principle was asserted by Judge STORY, who delivered the opinion of the Supreme Court of the *United States*, in the case of *Fairfax's Devisee v. Hunter's Lessee*, 7 *Cranch*, 603; and this was the opinion of the Supreme Court of *Massachusetts*, in the case of *Sheafe v. O'Neil*, 1 *Mass. Rep.* 256, cited by Judge STORY. It is reasonable in theory, and can have no ill effect in practice, that he who has a defeasible estate, may convey a defeasible estate. Provided the right of the Commonwealth to defeat the estate granted by the alien remains entire, it is immaterial who holds the land until that right be prosecuted. Supposing then, that the cases of the alien, and the corporation be similar, (and I see not how they can be distinguished,) it follows that the deed, from the *Bank of North America* to *James Ross*, conveyed a fee simple, defeasible by the Commonwealth. The counsel for the plaintiff did indeed contend, that this deed might be considered as a mortgage, though on its face it appears to be an absolute conveyance. But this construction cannot be supported. In order to carry the intent of the grantor into effect, a deed intended to operate as one species of conveyance, may be construed to operate as another, provided it contain words sufficient. But it cannot be construed so as to *destroy* the intent of the parties, as would be the case by holding this deed to be a mortgage; for it was the clear intent of both parties to make an absolute sale, and not a mortgage. When *William Henry* conveyed the lands mentioned in his deed, it was his intent, that in consideration thereof, the debt due from him to the bank should be extinguished, and the bank agreed to accept the conveyance in satisfaction of the debt. But supposing it to be a mortgage, the debt would be extinguished, and *Henry* would still remain responsible. I am clearly of opinion therefore, that it was not a mortgage, but an absolute conveyance.

Upon the whole, I am of opinion, that there was error, in admitting the deed from the *Bank of North America* to *James Ross* without proof of the corporate seal, and that there is no other error in the record. The judgment is therefore to be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

LONG v. GEORGIA PACIFIC R. CO.

1890. 91 *Alabama*, 519.¹

MCCLELLAN, J. The case made by the amended bill is this: On April 23, 1883, the complainant, B. M. Long, and his wife, Amanda C. Long, executed to the Georgia Pacific Railway Co. a deed upon valuable consideration presently paid, to and of the iron, coal and oil interests and properties in and pertaining to certain tracts of land, aggregating about four thousand acres; the said Long retaining the fee to said lands, except in respect to said mineral interests, and continuing in possession thereof. The grantee is a corporation, and was and is without power to purchase and hold said land, or the mineral interests in the same. The bill seeks to have the deed declared void, because of this incapacity of the corporation, and to have the same cancelled as a cloud upon complainant's title. The bill was demurred to on several grounds, and the demurrer was sustained generally, the decree to that end being now assigned as error.

Only those grounds of error which present the question, whether a vendor who has sold, received payment for, and conveyed land to a corporation, which had no power to hold the same, can have any relief in respect to the transaction, are discussed in argument; and to these our consideration will be confined, since it is manifest that the determination of this question, in line with the decree below, as we think it must be determined, will be fatal, not only to the present appeal, but to complainant's cause of action.

It is thoroughly well settled law, that a party to an *ultra vires executory* contract made with a corporation is not estopped to set up the want of corporate capacity in the premises, either by the fact of contracting, whereby the power to contract is, in a sense, admitted or recognized, or by the fact that the fruits or issues of the contract have been received and enjoyed; and this, though the assault upon the transaction comes from the corporation itself. — *Marion Savings Bank v. Dunklin*, 54 Ala. 471; *Chambers v. Falkner*, 65 Ala. 448; *Sherwood v. Alvis*, 83 Ala. 115; *Chewacla Lime Works v. Dismukes*, 87 Ala. 344. But, where the contract is fully executed — where whatever was contracted to be done on either hand has been done — a different rule prevails. In such case, the law will not interfere, at the instance of either party, to undo that which it was originally unlawful to do, and to the doing of which, so long as the contract to that end remained executory, neither party could have coerced the other. As declared by Mr. Bishop, "the parties voluntarily doing of what they have unlawfully agreed, places them, in effect, in the same position as if the contract had been originally good; neither can recover of the other

¹ Statement and arguments omitted. — Ed.

what was parted with. The reason for which is, that, since they are equally in fault, the law will help neither." — Bishop on Contracts, § 627.

The former decisions of this court are in line with this doctrine, and fully recognize the distinction between executory and executed void contracts, to the effect that, while suits to enforce the former may always be defended on the ground of their invalidity, no relief prayed upon such ground can be granted with respect to the latter. — *Morris v. Hale*, 41 Ala. 510; *Ingersoll v. Campbell*, 46 Ala. 282; *Sherwood v. Alvis*, 83 Ala. 115; *Dudley v. Collier*, 87 Ala. 431; *Craddock v. Mortgage Co.*, 88 Ala. 281. And this is the doctrine generally declared by other courts. — *Thomas v. Railroad Co.*, 101 U. S. 71; *Day v. S. S. B. Co.*, 57 Mich. 146; s. c., 52 Amer. Rep. 352; *Parish v. Wheeler*, 22 N. Y. 494; *Miners' Ditch Co. v. Tellerbach*, 37 Cal. 542, 606; *Terry v. Eagle Lock Co.*, 47 Conn. 141.

There is no question but that the case presented by the bill involved a contract on the part of the railway company to buy, and on the part of the complainant to sell, certain interests in the land described. It is equally clear that the payment of the agreed price on the one hand, and the execution of the conveyance on the other, fully executed this contract on both sides, left nothing to be done by either party in the premises, and bring the transaction within the principle we have been considering, which denies to the complainant any relief in respect to it.

The same conclusion is reached by another well established principle. It is, that when a party sells and conveys property to a corporation, which is without power to purchase and hold the same, and receives compensation therefor, there being no fraud in the transaction, he is in no sense injured or prejudiced by the incapacity of the corporation, nor can he be heard to complain of it; but the question becomes one between the corporation and the State, the sovereign alone having the right to impeach the transaction; and until it supervenes for this purpose, the corporation is vested with perfect title against all the world, defeasible only on office found. — *R. & B. Railroad Co. v. Proctor*, 29 Vt. 93; *Leazure v. Hillegas*, 7 Serg. & Rawle, 313; *Gouldie v. Northampton Water Co.*, 7 Pa. St. 233; *Baird v. Bank of Washington*, 11 Serg. & Rawle, 411; *Lathrop v. Bank*, 8 Dana, 114, 129; *Hough v. Cook County Land Co.*, 73 Ill. 23; s. c., 24 Amer. Rep. 230; *Cowles v. Springs Co.*, 100 U. S. 55; *Reynolds v. Crawfordsville Bank*, 112 U. S. 405, 413; 2 Mor. Corp. § 710.

The decree of the chancellor is affirmed; and the same result is reached in the case of *B. L. Jones and B. B. Long v. Ga. Pac. Railway Co.*, submitted with this case, and involving the same question.

Affirmed.

FAYETTE LAND CO. v. LOUISVILLE & NASHVILLE R. CO.

1896. 93 *Virginia*, 274.¹

APPEAL from Circuit Court.

Bill in equity by L. & N. R. Co. against Fayette Land Co. *et als.*, to enforce payment for land sold by plaintiffs to defendants. In 1888, Flanary and wife conveyed to H. M. Smith, agent, a tract of 330 acres in Wise County, Va. In this transaction Smith was acting as agent for the L. & N. R. Co. In 1890 the L. & N. R. Co. conveyed to the Fayette Land Co. this tract, reserving a right of way and a depot site. One third of the purchase money was paid down. The remainder was payable in 1891 and 1892; and the vendor retained a lien on the land conveyed. H. M. Smith united in the deed to the Fayette Land Co. The bill avers that the balance of the purchase money is still unpaid, and prays that the defendant company may be required to pay it. Such proceedings were had that the Circuit Court entered a decree in favor of plaintiff for the balance claimed.

J. H. Fulton, E. M. Fulton, R. C. Minor, and R. T. Irvine, for appellant.

J. F. Bullett, Jr., and H. C. McDowell, Jr., for appellee.

KEITH, P. [After stating the case, and disposing of other assignments of error.]

These preliminary matters having been disposed of, we come now to the seventh assignment of error, which is that the court erred in giving a decree against the appellants on the merits.

The Louisville & Nashville R. R. Co. is a Kentucky corporation, authorized by an act of Assembly of this State, approved March 30, 1887 (Acts Extra Session, 1887, p. 19), to construct and operate a line of railroad in Virginia. By that Act it is made subject to all the limitations and restrictions imposed by the laws of Virginia upon railroad companies, and it is contended by appellant that Sec. 1073 of the Code of 1887, which is as follows:—

“The land acquired by any company incorporated for a work of internal improvement along its line generally, shall not exceed one hundred feet in width, except in deep cuts, and fillings, and then only so much more shall be acquired as may be reasonably necessary therefor; the lands which it may acquire for buildings or for an abutment along its line generally, shall not exceed three acres in any one parcel; and the land which it may acquire for buildings, or other purposes of the company at the principal termini of its work, or any place or places within five miles of such termini, shall not exceed fifteen acres in any one parcel; but in the case of a railroad company, land not exceeding forty acres in any one parcel may be acquired for its main depots,

¹ Only so much of the case is given as relates to one point. — Ed.

machine shops, and other necessary purposes connected with the business of said company,"

— renders the appellee incapable of acquiring or taking title to the real estate set out and described in its bill, and that therefore no title passed from it to the appellant, but that it is or was absolutely void or conveyed at most a defeasible title, the land being subject even in the hands of an alienee from a railroad company to be escheated to the Commonwealth. It may be conceded that if this were a bill for specific performance of a contract that the relief would be denied. See *Case v. Kelly*, 133 U. S. 21. But such is not the case. The agreement of the parties has been fully executed.

Section 1068 declares that:

"Every corporation, in respect to which it is not otherwise provided, shall have perpetual succession and a common seal . . . ; that it may contract and be contracted with, purchase, hold, and grant estates, real and personal, and make ordinances, by-laws and regulations . . . for the management of its estates, and the due and orderly conducting of its affairs."

This section is but declaratory of the common law.

Section 1070 declares:

"No incorporated company shall hold any more real estate than is proper for the purposes for which it is incorporated," &c.

This again is but a recognition of the common law principle.

Section 1072 provides the mode in which a company incorporated for internal improvement may enter upon land for the purpose of examining and surveying it.

Section 1073 has already been quoted in full.

That the conveyance of this land to the Louisville & Nashville R. R. Co. was not void is abundantly established by authority.

In the case of *The Banks v. Poitiaux*, 3 Rand. 136, it appears that the banks were by their charters authorized to hold such real estate "as was requisite for their immediate accommodation in relation to the convenient transacting of their business." Upon the lands purchased by the banks in that case they proceeded to erect buildings for the transaction of their business, and on either side of the buildings so erected there remained a vacant space, which they sold to the appellee; he failing to pay as agreed, the bank filed a bill for specific performance, and the chancellor decreed that the banks had exceeded their powers in purchasing and selling the property in question, it not being necessary in relation to the transaction of their business. Upon appeal it was held that while the power to acquire may be limited, restrained or prohibited, either by the charter creating the corporation or by a general law, such was not the effect of the charters in question, because the acts creating the charters are, with respect to the quantity of real estate which they were capable of holding, only directory.

"They impose no penalty in terms. They do not declare the purchase by, or conveyance to, the banks to be void, nor vest the title in

the Commonwealth, or any other than the banks, in consequence of such purchase and conveyance. The legal title passed to the banks by the conveyance to them, and their conveyance would effectually transfer that title to any other. If, in making the purchase of the land in question, the banks violated their charters, the corporation might, for that cause, be dissolved by a proceeding at the suit of the Commonwealth; and even in that case, it seems to be the better opinion, the property, if not previously conveyed to some other, would revert, upon the dissolution of the corporation, to the grantor, and not to the Commonwealth. But, any conveyance made by the corporation, before its dissolution, would be effectual to pass its title. The banks have, therefore, a title which they can convey to the appellee, and which would, in his hands, be indefeasible. It would seem extremely inconvenient, if every contractor with one of these banks could, for the purpose of avoiding his contract, institute the enquiry whether the bank had violated its charter."

In *Silver Lake Bank v. North*, 4 Johnson's Reports, the same principle is recognized.

In *Bank v. Matthews*, 98 U. S. 621, it is said: "Where a corporation is incompetent by its charter to take title to real estate, a conveyance to it is not void."

In *Mallett v. Simpson*, 94 N. C. 37, it was held that although a corporation is forbidden by its charter to hold real estate, yet a deed of land to it is valid, "and even when the right to *acquire* real property is limited by the charter, and the corporation transcends its power in that respect, a conveyance to it is not void, but only the sovereign can object. It is valid until assailed in a direct proceeding instituted by the sovereign for that purpose."

In *Nat. Bank v. Whitney*, 103 U. S. 99, the bank had taken security upon real estate for a loan which it was prohibited to do by the National Banking Law. Mr. Justice Field, delivering the opinion, said that "the statute did not declare such security void, but was silent on the subject; that had Congress so intended it would have been easy to say so, and it can hardly be presumed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decision." And, after citing numerous cases where a disregard of statutory prohibitions has not been held to vitiate the contracts of parties, but only to authorize actions by the Government against them, the court held that the prohibitory clauses of the banking law did not vitiate real estate securities taken for loans, and that a disregard of them only laid the association open to proceedings by the Government. . . . "That has always been the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to enforce its application."

In *Fritts et als. v. Palmer*, 132 U. S. 282, it is said by Mr. Justice Harlan, "that where a corporation is incompetent by its charter to take

a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."

The text writers are to the same effect. In 1 Beach on Corp., Sec. 378, it is said :

"No party except the State can object that a corporation is holding real estate in excess of its rights. Accordingly, under an Act which forbids a foreign corporation to 'acquire and hold' real estate, a deed of conveyance of land to such corporation is not void. It passes the title, and the corporation may hold the land subject to the Commonwealth's right to escheat. The Commonwealth alone can object to the legal capacity of a corporation to hold real estate. There must be a direct proceeding by the State for the purpose of vacating the deed."

In Thompson on Corporations, Sec. 5795, it is said :

"Although a corporation may be disabled or forbidden from holding land at all, or from holding land for particular purposes, or from holding land beyond a prescribed limit, yet if it does hold land in the face of such disabilities or prohibitions, its title will be good except as against the State alone, and that it will be deemed to have a good title until its title is invalidated in a direct proceeding instituted by the State for that purpose."

And in Sec. 5797, it is said :

"Although the State might, in a direct proceeding for that purpose, have overthrown the title of the corporation and escheated the property to its own use, yet, not having done so, the corporation may in the meantime convey an indefeasible title to another, of whatever estate in the lands had been conveyed to or acquired by it."

The doctrine that the State alone can interfere seems to rest upon the principle suggested in *The Banks v. Poitiaux*, *supra*, that it would be extremely inconvenient if every contractor with corporations might, for the purpose of avoiding their contracts, be permitted to institute enquiry as to violations of the charter. It is a question which concerns public interests, and the State alone is competent to protect and defend them. *Runyan v. The Lessee of Coster*, 14 Peters, 122; *Wroten's Assignee v. Armat & als.*, 31 Gratt. 251.

Enough has been said to show that the conveyance to the Louisville & Nashville Railroad Company was not void, but that it served to vest the title in the appellant.

Is the deed voidable? As we have seen in discussing this first branch of this assignment of error, no one can be heard to question the right of a corporation to acquire and hold real estate, except the State by which the corporation was created, or that State within whose limits and by whose permission or authority, express or implied, it does business, and it must do so by a direct proceeding instituted for that purpose.

There is much plausibility in the suggestion of the appellee that Sec. 1073 was designed to prohibit the acquisition of real estate by means

of the exercise of the right of eminent domain, or by condemnation, as it is called, except to the extent and within the limits and in the mode appointed by that section.

By Sec. 1068 corporations are authorized to purchase and hold real estate without any limitation whatsoever; by Sec. 1070 they are prohibited to hold more real estate than is proper for the purposes for which they are incorporated. In order to give full effect to these sections as well as to Sec. 1070, there is much room to contend that the first regulates the acquisition of real estate by contract, and that the last applies to proceedings by corporations for the condemnation of real estate.

But, granting that Sec. 1073 applies to the acquisition by corporations of real estate without respect to the mode of acquisition, none of the sections referred to declare that the title shall be void. As was said in *The Banks v. Poitiaux*, the statute law is only directory in this respect. It imposes no penalty in terms. It does not declare the purchase by or the conveyance to the banks to be void, nor vest the title in the Commonwealth in consequence of such purchase and conveyance. The only penalty incurred is that which waits upon every violation of its charter by an incorporated institution. The impending danger of a judgment of ouster and dissolution is, we think, the only check contemplated by the law. That has always been the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority may see fit to enforce its application. See *National Bank v. Whitney*, *supra*.

The statute of mortmain has never been adopted into the jurisprudence of this State. Lomax's Dig., 2 ed., p. 815; *Rivanna Navigation Co. v. Dawson*, 3 Gratt. 21; *Conrad v. Marshall*, 5 Call, 364. It is safe to say, therefore, that there is no proceeding authorized by the common law of Virginia under which lands acquired by a corporation in violation of its charter can be forfeited to the State.

Is there any statutory authority by which it can be done? Chapter 105 of the Code is upon the subject of "Escheats and Property Derelict." It provides for the appointment of an escheator in every county; and Sec. 2374 directs each commissioner of the revenue annually to furnish the escheator of his county or corporation with "a list of all lands within his district of which any person shall have died seized of an estate of inheritance intestate, and without any known heir, or to which no person is known by him to be entitled."

We have seen that by the deed from Flanary and wife the title passed to and vested in Smith as the agent of the Louisville & Nashville R. R. Co., and by a subsequent deed it was conveyed to the Louisville & Nashville R. R. Co. directly. The land in controversy, therefore, does not come within the terms of the section just quoted, for the commissioner of the revenue could not in the face of the conveyances of record rightfully say that there is no person known by him to be entitled to it.

It appears further that this property has been conveyed by deed from

the appellee to the appellant, and that no proceedings have been taken by the State to revoke the privileges given the appellee by the Act of Assembly before referred to. Acts of Special Session 1887, p. 19. The deed of the Louisville & Nashville R. R. Co. was, therefore, effectual to pass its title to the land in controversy and vest it in the Fayette Land Company. See *The Banks v. Poitiaux*, 3 Rand. at page 142; and 5 Thomp. Com. on the Law of Corp., Sec. 5797, and cases there cited.

We are of opinion, therefore, that the seventh assignment of error is not well taken, and, upon the whole case, the decree complained of must be affirmed.

Affirmed.

SECTION III.

Ultra Vires Lease. Remedies in Case of Repudiation by either Party before the Expiration of the Term.

THOMAS v. WEST JERSEY R. CO.

1879. 101 U. S. 71.¹

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action of covenant, by George W. Thomas, Alfred S. Porter, and Nathaniel F. Chew, against the West Jersey Railroad Company, and they, to maintain the issue on their part, offered to prove the following facts:—

On the eighth day of October, 1863, the Millville and Glassboro Railroad Company, a corporation incorporated by the legislature of New Jersey, March 9, 1859, entered into an agreement with them, whereby it was stipulated that the company should, and did thereby, lease its road, buildings, and rolling-stock to them for twenty years from the 1st of August, 1863, for the consideration of one-half of the gross sum collected from the operation of the road by the plaintiffs during that period; that the company might at any time terminate the contract and retake possession of the railroad, and that in such case, if the plaintiffs so desired, the company would appoint an arbitrator, who, with one appointed by them, should decide upon the value of the contract to them, and the loss and damage incurred by, and justly and equitably due to them, by reason of such termination thereof; that in the event of a difference of opinion between the arbitrators, they were to choose a third, and the decision of a majority was to be final, conclusive, and binding upon the parties.

On the 12th of October, 1867, articles of agreement were entered into between the Millville and Glassboro Railroad Company and the West Jersey Railroad Company, the defendant, whereby it was agreed that the former should be merged into and consolidated with the latter.

In November, 1867, a written notice was served by the Millville and Glassboro Railroad Company upon the plaintiffs, putting an end to the contract and to all the rights thereby granted, and notifying them that the company would retake possession of the railroad on the first day of April, 1868.

On the 18th of March, 1868, the legislature of New Jersey passed an act whereby it was enacted that, upon the fulfilment of certain pre-

¹ Statement abridged. Argument and part of opinion omitted. — Ed.

liminaries, the Millville and Glassboro Railroad Company should be consolidated with the West Jersey Railroad Company, "subject to all the debts, liabilities, and obligations of both of said companies." The conditions required by that act were fulfilled, and the railroad was duly delivered by the plaintiffs to the West Jersey Railroad Company on the 1st of April, 1868.

On April 13, 1868, and again on May 22 of the same year, notices to arbitrate according to the terms of the agreement were served by the plaintiffs upon the Millville and Glassboro Railroad Company, and immediately thereafter upon the West Jersey Railroad Company. The latter company refused to comply with the terms of either notice; but subsequently, on the 21st of December, 1868, an agreement of submission was entered into between the plaintiffs and the latter company, whereby H. F. Kenney and Matthew Baird were appointed arbitrators, with power to choose a third, to settle the controversy between the parties. These arbitrators disagreeing, called in a third, who joined with said Baird in an award, by which the value of the unexpired term of the lease, and the loss sustained by reason of the termination thereof to and by the plaintiffs, was adjudged to be the sum of \$159,437.07; and the West Jersey Railroad Company was ordered to pay that sum to the plaintiffs. This award was subsequently set aside in a suit in equity brought in New Jersey.

The plaintiffs further offered to prove their compliance in all respects with the terms of the lease, its value, and the loss and damage they had sustained by reason of its termination as aforesaid. The court excluded the offered testimony on the ground that the lease by the Millville and Glassboro Railroad Company to the plaintiffs was *ultra vires*, and directed the jury to return a verdict for the defendant. The plaintiffs duly excepted and sued out this writ.

George W. Biddle, and A. Sydney Biddle, for plaintiffs in error.
Samuel Dickson, contra.

MILLER, J. The ground on which the court held the contract to be void and on which the ruling is supported in argument here, is, that the contract amounted to a lease, by which the railroad, rolling-stock, and franchises of the corporation were transferred to plaintiffs, and that such a contract was *ultra vires* of the company.

The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter:—

"That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfilment of such contracts."

This is no more than saying, "you may do the business of carrying goods and passengers, and may make contracts for doing that business.

Such contracts you may make with any other corporation or with individuals." No doubt a contract by which the goods received from railroad or other carrying companies should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease, or transfer to others the entire road and the rights and franchises of the corporation. To do so is to deprive the company of the power of making those contracts which this clause confers and of performing the duties which it implies.

It is next insisted, in the language of counsel, that though this may be so, "a corporate body may (as at common law) do any act which is not either expressly or impliedly prohibited by its charter; although where the act is unauthorized by the charter a shareholder may enjoin its execution; and the State may, by proper process, forfeit the charter."

We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.

There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy.

It remains to consider the suggestion that the contract, having been executed, the doctrine of *ultra vires* is inapplicable to the case. There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been

fully performed on both sides, whereby money has been paid or property changed hands; the courts have refused to sustain an action for the recovery of the property or the money so transferred.

In regard to corporations, the rule has been well laid down by Comstock, C. J., in *Parish v. Wheeler* (22 N. Y. 494), that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.

But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action. Damages for a material part of the contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this it is not an executed contract.

Not only so, but it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts.

We cannot see that the present case comes within the principle that requires that contracts which, though invalid for want of corporate power, have been fully executed shall remain as the foundation of rights acquired by the transaction.

We have given this case our best consideration on account of the importance of the principles involved in its decision, and after a full examination of the authorities we can see no error in the action of the Circuit Court.

Judgment Affirmed.

MR. JUSTICE BRADLEY did not sit in this case.

AMERICAN UNION TELEGRAPH CO. v. UNION
PACIFIC R. CO.1880. 1 *McCrary's U. S. Circuit Court Reports*, 188.¹

MOTION for injunction.

The Union Pacific Railroad Co. was chartered by Congress, with power to "lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph, with appurtenances." The U. S. endowed the corporation with large grants of lands and bonds to aid in the construction, and imposed upon the corporation the duty of reimbursing the government from the earnings of the road and telegraph line. In 1866 the U. P. R. Co. leased to the Am. Union Tel. Co. all its telegraph lines, wires, poles, &c. for the whole term of the R. R. Co.'s charter and any renewals thereof; subject to the rights of the United States as set forth in the charter of the railroad company, and on the condition that plaintiff would fully perform all the duties imposed or to be imposed upon the railroad company by its charter or by the laws of the United States. The R. R. Co. received a valuable consideration in stock of the Telegraph Co., which stock the R. R. Co. applied to its own use. In Feb. 1880, the R. R. Co. assumed, of its own motion, to rescind the lease, and to resume possession and control of the property; for which purpose its agents cut certain wires running from plaintiff's offices to the main line. The Telegraph Co. filed a bill; praying, *inter alia*, for an injunction to restrain the defendants from disregarding the above contract, and from interfering with the property covered thereby, and from preventing plaintiff from reconnecting the wires, so as to restore them to their original condition before the same were cut. The defendants answered, affidavits were filed, and a full hearing was had upon the application for injunction (a temporary injunction having been allowed).

Williams & Thompson, and *C. Beckwith*, for plaintiffs.

John F. Dillon, *Sidney Bartlett*, *J. P. Usher*, and *A. J. Poppleton*, for defendants.

MCCRARY, CIRCUIT JUDGE.

[The learned Judge *held*, that the power which the charter confers, to "construct, furnish, maintain, and enjoy a continuous railroad and telegraph," was personal, and carried with it a duty and obligation which could not be transferred; that the contract of lease was *ultra vires*, because it transferred from the company property which was necessary to the performance by the company of its public duties; and also because it attempted to transfer certain franchises of the company,

¹ Statement abridged from opinion. Arguments and part of opinion omitted.—Ed.

viz. the right to operate a telegraph line and to fix and collect tolls for the use of the same. The remainder of the opinion is as follows:]

This brings me to the question whether the railroad company can be permitted to rescind the contract, and on its own motion to take possession of the lines, offices, and property, without first returning the consideration received therefor from the plaintiff. As already stated, the railroad company received from the plaintiff, in payment for the property and rights agreed to be transferred by said contracts, 17,800 shares of the capital stock of the corporation plaintiff. There is a dispute as to the value of the stock, but I believe it is not placed by any one of the deponents at less than \$150,000, while some of them place it at a much higher sum.

No case has been cited in argument, nor have I been able to find one, which holds that a court of equity, having jurisdiction of the parties to "and the subject-matter of" an illegal contract, should require one of such parties to give up what he has received under it, without requiring the other to do the same. Many cases hold that a corporation which has made a contract *ultra vires*, which has not been fully performed, is not estopped from pleading its own want of power when sued upon such contract; but that doctrine does not apply to a case where a party comes into a court of equity, and, while retaining all that he has received upon such a contract, asks to be permitted to retake what he has parted with under it. I take it there is nothing in the law, as there is certainly nothing in the principles of equity, to estop the court from saying that the obligation to return the property transferred under these contracts is mutual, and shall not be enforced against one of the parties without being at the same time enforced against the other. As the parties and the subject-matter are now before the court, it is the duty of the court, as far as possible, to place them in *statu quo*. It has been held that even in cases at common law, a contract, *ultra vires*, made between a corporation and another person, and under which the corporation has received value, which it retains, will be so far enforced as to estop the corporation from refusing payment on the ground of its own want of power. *Bradley v. Bullard*, 55 Ill. 417.

And in the case of *Thomas v. R. Co.* (Supreme Court U. S.), already quoted from at length, Mr. Justice Miller, upon this point, says: "There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred. And in regard to corporations, the rule has been well laid down by Chief Justice Comstock, in *Parish v. Wheeler*, 22 N. Y. 404, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely,

the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms."

The present case, like the New Jersey case in which these remarks are made, is one on which the contract has been executed in part, but it differs from that case in one important particular. In the New Jersey case the court say that, "so far as it [the contract in question] has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms."

If that case had been in equity, and it had appeared that the railroad company had received in advance the full consideration for the whole term of the lease, which it retained, while asking to be relieved from the contract, I have no doubt the court would have said: "You must come into this tribunal with clean hands; you must do equity before you can seek the aid of a court of conscience."

The contention of the railroad company is that it should be permitted to take possession of the property in controversy without process or legal proceedings. While I am clear that the contracts under which the property is held by plaintiff are *ultra vires*, there is a dispute upon that subject, and such a dispute as in my judgment cannot be determined by the railroad company of its own motion.

The right of rescission does not justify the railroad company in taking possession except by lawful means. The plaintiff has a right to be heard upon issue joined in a proper proceeding before being ejected. The present question is not whether the contracts should be rescinded and the property restored to the railroad company, but whether this should be done by the railroad company upon its own motion, and in a way to deprive the plaintiff not only of a hearing in the regular course of this court, but also deprive it of the right of appeal.

It is one thing for me to hold that the contracts are in my judgment *ultra vires*, and quite another to say to the railroad company, "You may turn the plaintiff out and take possession without giving it a day in court."

An injunction will often be granted to restrain a party from deciding for himself a question involving controverted rights, and to compel him to resort to the courts, and this without regard to the absolute merits of the controversy. It is enough that there is a controversy to justify a court of equity in directing that it be settled by legal proceedings. *Eckelkamp v. Schroeder*, 45 Mo. 505; *Varick v. New York*, 4 Johns. Ch. 53; *Dudley v. Trustees*, 12 B. Mon. 610; *Farmers v. Reno*, 53 Pa. St. 224; *Sunsing v. Steamboat Co.*, 7 Johns. Ch. 162.

The principle settled by these and many other cases is that a party who is in actual possession of property, claiming under color of title, is not to be ousted, except by the means provided by law, and such a possession the court will protect by injunction from disturbance by any other means. For this reason, therefore, as well as upon the grounds

above stated, I am clearly of the opinion that the railway company cannot be permitted to oust the plaintiff from possession without process.

The injunction, heretofore granted, will be so far modified as to make it clear that the railroad company is at liberty to institute legal proceedings, either by cross-bill in this case or otherwise, to cancel and set aside the said contracts upon a return of the consideration, and to settle and adjust, upon principles of equity, the accounts between the parties.

ST. LOUIS, VANDALIA, & TERRE HAUTE R. CO. v. TERRE HAUTE & INDIANAPOLIS R. CO.

1892. 145 U. S. 393.¹

APPEAL from U. S. Circuit Court for the Southern District of Illinois.

Bill in equity, filed in 1887, by an Illinois corporation against an Indiana corporation, to set aside and cancel a conveyance, or lease, of the plaintiff's railroad and franchises to the defendant for a term of 999 years. The lease was made in 1868. The defendants took possession of the road shortly after the execution of the lease, and have ever since operated it. The bill, as amended, prayed for a cancellation and surrender of the lease, for a return of the railroad and other property held under it, for an injunction against disturbing the plaintiff in the possession and control thereof, and for an account of the sums which the defendant had received, or with due diligence might have received, from the use and operation of the railroad and property. A demurrer to the bill was sustained by the Circuit Court (33 Federal Reporter, 440).

Lyman Trumbull, John M. Butler, Henry S. Robbins, and Perry Trumbull, for appellant.

George Hoadly, for appellee.

GRAY, J. The object of this suit between two railroad corporations, as stated in the amended bill, is to have a contract, by which the plaintiff transferred its railroad and equipment, as well as its franchise to maintain and operate the road, to the defendant for a term of nine hundred and ninety-nine years, set aside and cancelled, as beyond the corporate powers of one or both of the parties.

In short, by this contract one railroad corporation undertook to transfer its whole railroad and equipment, and its privilege and franchise to maintain and operate the road, to another railroad corporation for a term of nine hundred and ninety-nine years, in consideration of the payment from time to time by the latter to the former of a certain

¹ Statement abridged. Arguments and part of opinion omitted. — ED.

portion of the gross receipts. This was, in substance and effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither corporation had the lawful power to enter into, unless expressly authorised by the State which created it, and which, if beyond the scope of the lawful powers of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, and would support no action or suit by either against the other. *Thomas v. Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 630; *Oregon Railway v. Oregonian Railway*, 130 U. S. 1; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24.

Upon the question whether this contract was *ultra vires* of either corporation, this case cannot be distinguished in principle from *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, above cited.

[After discussing the question whether the contract was beyond the corporate powers of either party, the opinion continues as follows:]

It may therefore be assumed, as contended by the plaintiff, that the contract in question was *ultra vires* of the defendant, and therefore did not bind either party, and neither party could have maintained a suit upon it, at law or in equity, against the other.

It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the repeated and full discussions which the doctrine of *ultra vires* has undergone in the English courts within the last fifty years, no attempt has been made to bring a suit like this. The only cases cited in the elaborate briefs for the plaintiff, or which have come to our notice, approaching this in their circumstances, are in American courts, not of last resort, and present no sufficient reasons for maintaining this suit. *Auburn Academy v. Strong*, Hopkins Ch. 278; *Atlantic & Pacific Telegraph Co. v. Union Pacific Railway*, 1 McCrary, 541; *Western Union Telegraph Co. v. St. Joseph & Western Railway*, 1 McCrary, 565; *Union Bridge Co. v. Troy & Lansingburgh Railroad*, 7 Lansing, 240; *New Castle Railway v. Simpson*, 21 Fed. Rep. 533.

The English cases relied on by the plaintiff were either suits to set aside marriage brokerage bonds, as in *Drury v. Hooke*, 1 Vernon, 412, and *Smith v. Bruning*, 2 Vernon, 392; *S. C. nom. Goldsmith v. Bruning*, 1 Eq. Cas. Ab. 89; or to recover back money paid for the purchase, without leave of the Crown, of a commission in the military or naval service, as in *Morris v. McCulloch*, Ambler, 433; *S. C.* 2 Eden, 190. Those cases have sometimes been justified upon the ground that, the agreement being against the policy of the law, the relief was given to the public through the party. *Debenham v. Ox*, 1 Ves. Sen. 276; *St. John v. St. John*, 11 Ves. 526, 536; *Cone v. Russell*, 3 Dickinson (48 N. J. Eq.), 208. But Sir William Grant explained them as proceeding upon the ground that the plaintiff was less guilty than

the defendant. *Osborne v. Williams*, 18 Ves. 379, 382. And *Morris v. McCulloch* can hardly be reconciled with his decision in *Thomson v. Thomson*, 7 Ves. 470, or with the current of later authorities.

The general rule, in equity, as at law, is *In pari delicto potior est conditio defendentis*; and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 12 Wall. 349, 355; *Spring Co. v. Knowlton*, 103 U. S. 49; Story Eq. Jur. § 298.

While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defence in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defence effectual, and when necessary for that purpose. Adams on Eq. 175. Consequently, it is well settled, at the present day, that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and cancelled, upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defence. Story Eq. Jur. § 700 *a*, and cases cited; *Simpson v. Howden*, 3 Myl. & Cr. 97; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 282.

When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas v. Richmond*, above cited; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 284. For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, and therefore clearly illegal, cannot be recovered back at law, nor the conveyance set aside in equity, unless obtained by such fraud or oppression on the part of the grantee, that the conveyance cannot be considered the voluntary act of the grantor. *Worcester v. Eaton*, 11 Mass. 368, and 13 Mass. 371; *Atwood v. Fisk*, 101 Mass. 363; *Bryant v. Peck & Whipple Co.*, 154 Mass. 460; *Williams v. Bayley*, L. R. 1 H. L. 200; *Jones v. Merionetshire Society*, 1892, 1 Ch. 173, 182, 185, 187.

In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety-nine years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers

which it had received from the State, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was *in pari delicto* with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property, and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract.

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches. *Harwood v. Railroad Co.*, 17 Wall. 78; *Graham v. Birkenhead & Co. Railway*, 2 Hall & Twells, 450; *S. C.* 2 Macn. & Gord. 146; *Efooks v. Southwestern Railway*, 1 Sm. & Gif. 142, 164; *Gregory v. Patchett*, 11 Law Times (N. S.) 357.

This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co. v. Knowlton*, 103 U. S. 49; *Logan County Bank v. Townsend*, 139 U. S. 67, and cases there cited.

But the case is one in which, in the words of Mr. Justice Miller in a case often cited in this opinion, the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands. *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 316, 317. See also *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 434, 468, 469; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 56, 57, 61.

Decree affirmed.

SECTION IV.

*Bequest to Corporation in Excess of Charter Authority.*TRUSTEES OF DAVIDSON COLLEGE v. EXECUTORS AND
NEXT OF KIN OF MAXWELL CHAMBERS.1857. 3 *Jones Equity (North Carolina)*, 253.¹

BILL in equity, originally brought against the executors of Chambers, alleging that, by the will of Chambers, legacies to a large amount were bequeathed to plaintiffs, and that assets sufficient to pay the same had come to the hands of the executors; and praying that the defendants might be decreed to pay over the same. The cause was set down for hearing upon the bill, answer, and exhibit. The Court remanded the case for the purpose of making additional parties.

The bill was amended, according to the suggestion of this Court, by making the next of kin and the heirs-at-law of Maxwell Chambers, parties defendant. Process was also issued to the Attorney General as the representative of the State, and to the trustees of the University.

An Act of Assembly was passed after the death of Chambers, extending the corporate capacity of the plaintiffs, so as to enable them to hold property to the amount of \$500,000, and relinquishing to the plaintiffs any interest which the State or University might have in the fund.

Graham, Osborne and Wilson, for the plaintiffs.

Winston, Sr., for the executors.

Jones, for the next of kin.

Bailey, Attorney General, filed a copy of the Act of Assembly above mentioned, and declined further appearing.

PEARSON, J. The charter of the college (act of 1838) enacts among other things: Sec. 1. "The trustees of Davidson College shall be able and capable to purchase, have, receive, take, hold, and enjoy in fee simple or lesser estates, any land, &c., by gift, grant, devise, &c.; and shall be able and capable, in law, to take, receive, and possess all moneys, goods and chattels, that have been, or shall hereafter be given, sold or bequeathed, for the use of said college, &c." Sec. 10. "Be it further enacted, that the *whole amount of real and personal estate belonging to said college, shall not at any one time exceed in value, the sum of two hundred thousand dollars.*"

¹ Statement abridged. Portions of the opinions omitted. — ED.

The testator, besides a devise of a large amount of real estate, bequeaths, for the use of the college, a *fund of personalty*, which, when added to the property owned by the college at the time of his death, will greatly exceed \$200,000. We have this question: Is there any principle upon which this Court can declare, that the college is entitled to the excess of the fund, after the \$200,000 is fully made up, and decree that the executors shall pay over such excess for the use of the college? or are the next of kin of the testator entitled to the excess, on the ground, that it is not effectually disposed of by the will?

The general rule is well settled: When a legacy, from any cause, fails to take effect, the subject devolves upon the next of kin of the testator, as property undisposed of; for an ineffectual disposition is no disposition at all. For instance, if a legacy fails by "lapse," i. e., the death of the legatee in the life-time of the testator; or by reason of its vagueness, as when the object of the bounty is not sufficiently described to enable the Court to say who is to take beneficially; *Bridges v. Pleasants*, 4 Ire. Eq. 26, where the object was "the poor saints;" or because the purpose of the testator is against the policy of the law, i. e., to establish an order of privileged slaves; *Lea v. Brown*, ante, 142; or, where those for whose benefit the bounty was intended, refuse to accept it; *McAuley v. Wilson*, 1 Dev. Eq., 276; or, where those for whose benefit the bounty is intended are *positively forbidden by law from owning it*, which is our case—made stronger, if possible, by the fact, that the prohibition is expressed in the very act by which the corporation is created.

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We are satisfied, after hearing a full argument in behalf of the college, that there is no principle upon which a decree can be made in its favor, in respect to the excess of the fund. In England, under the doctrine of *cy pres*, the Chancellor would direct the excess to be applied to some other charity, as near as might be, like that indicated by the testator, and if no other male Presbyterian college existed, it would be applied to a female college of that denomination. *Attorney General v. Tonna*, 2 Ves. Jun. 1; 4 Bro. C. C. 103; but our Court has never acted upon that refinement. *McAuley v. Wilson*, sup.

The cases of *purchases* of land by aliens and corporations, under the statutes of mortmain, are not in point. It is settled, that an alien or a corporation may, by purchase, *take* land, but cannot *hold*; and the doctrine is put on the ground, that if one by an *executed conveyance*, which is *his own act*, passes land to an alien, or corporation, he shall not have it back; but it shall belong to the sovereign, upon office found. It is otherwise in regard to the *act of law*. If the heir, of one dying seized of land, be an alien, the law will not cast the descent on him, because he cannot hold beneficially, and the law will not give with one hand and take away with the other, but will cast the descent upon the next relation who is capable of holding. For the same reason, an alien husband does not take as tenant by the curtesy, nor an alien wife take dower.

In the case of a will of personalty, the property does not pass directly to the legatee; and the law will not require, or permit, the executor to assent to the legacy, unless it can take effect beneficially, according to the intention of the testator; but it devolves upon the next of kin, by the general rule, stated and illustrated above.

But it is asked: Are the plaintiffs in a worse condition, because the executors declined to pay over the fund without being protected by the sanction of this Court, than if they had been willing to take the responsibility of paying it over without suit? Certainly not. Upon the death of the testator, without having effectually disposed of this fund, the rights of the next of kin "*were vested.*" They could have filed a bill to prevent the executor from paying it over, or to follow the fund in the hands of the plaintiffs. This is also a full answer to the position, that the act of the Legislature, at its last session, by which the college is allowed to own property to the value of \$500,000, and all right to the fund on the part of the State or of the University is relinquished, removes the objection to the plaintiffs' recovery. The rights of the next of kin being vested, the act of the Legislature does not in anywise affect them; so, the only effect of the act, besides enlarging the amount which the college is now capable of owning, is to waive any right of the State; but as we have seen, the State had none.

This being a bill against the executors only, the personalty was directly involved; but upon a suggestion, that the heirs-at-law might have an interest in the question, whether the full amount of the \$200,000 should be made up out of the personalty alone, or out of the personalty and realty devised, by rateable contribution, it was directed that they should be made parties. We are satisfied that the personalty is the primary fund, and the requisite amount must be made up out of that exclusively; for which the necessary enquiry will be directed. The bill will be dismissed as to the heirs, without costs, as they claim the legal title to the land. The question between them and the college may be presented in an action of ejectment, if the parties are so advised.

BATTLE, J.

Hence, in England, and perhaps in this State, an alien might take real property by devise, which would give him a good title to it, as against all persons but the sovereign. In analogy to this, the counsel for the plaintiffs have contended that their clients have the right to take the whole legacy bequeathed to them by Mr. Chambers, though it may be that by force of the restrictive clause in their charter, the State might, if it saw fit, take from them the excess over the value of the property which they were authorized to own. The argument would have much force — perhaps be irresistible — if the legacy vested at once and immediately, under the will, in the plaintiffs. Such is the

case undoubtedly in a devise of land. The devisee takes in at once by force of the will, and his title becomes complete immediately upon the death of the devisor. But the case of a legacy is well known to be different. Upon the testator's death, all his personal property becomes vested in the executor, who holds it in trust, first, for the payment of the funeral expenses, charges of administration and debts, and then for the payment of legacies; and if there be a residue undisposed of by the will, he is bound, since the act of 1789, (see 1 Rev. Stat. ch. 46, sec. 18; Rev. Code, ch. 46, sec. 24), to pay it over to the next of kin. The legatee has no legal title to the legacy until the executor shall give his assent to it. So strong is this rule, that if a legatee take into possession a specific chattel, given to him by the will, without the consent of the executor, the latter may by a suit at law recover it back; 2 Williams on Ex'rs., 845. It is true, that if, after the payment of all the debts and other legal charges upon the estate, the executor withholds his assent to a legacy, the legatee may, by a bill in equity, compel him to assent to it, and thereby give him a title to it; but it is by means of a suit in equity alone that he can get possession of a legacy, either general or specific, from an obstinate or dilatory executor. It needs the aid of a court, then, to enable the plaintiffs to recover the legacy which they claim; and the analogy to the case of an alien cannot be of much avail to them, unless we find that the law will *per se* and *proprio vigore* cast an estate upon him, or that a court either of law or equity, will lend him its assistance to obtain it.

It seems to me, that, in admitting that the State, upon office found, or otherwise, may seize and take to its own use, the excess, the plaintiffs' counsel virtually admit that it is unlawfully held by the college. Why so forfeited to the State unless because the college has it in opposition to the express prohibition of its charter? If unlawful for the plaintiffs to have it, can a court of equity assist them to get it?

NASH, C. J., *dissentiente*.

Secondly. Let it be granted, that by taking the whole of the property devised, the total amount in value would exceed what the corporation was entitled to possess, and thereby its charter might be forfeited, can the defendants, the executor, or the next of kin, take advantage of the breach of the condition in these proceedings? A charter is a contract between the corporation and the sovereign. It is well settled that none but the parties or their privies, can take advantage of a breach of a condition. Now, neither Mr. Chambers, nor his executor, nor his next of kin, are any parties or privies to the contract — upon what principle then, is it, that the executor can refuse his assent to the legacy to the college, or upon what principle can the next of kin claim it, or any portion of it? If Mr. Chambers, while in life, had donated to the college two hundred thousand dollars in cash — or its value in

property, specified in the will, could he have been heard in a court of justice to say, that he had given the corporation too much, and they must pay back to him as much of the donation as was over and above what it could legally hold or retain? Suppose him to have brought an action for the surplus, could he have recovered? Surely not. He would be estopped, and of course, so would all persons claiming under him; *Gilliam v. Bird*, 8 Ire. Rep. 280. His death cannot alter the proposition. Whatever would estop him, must estop his personal representative, and must equally estop his next of kin, who claim through him. I cannot, therefore, see how either the next of kin or the executor of Maxwell Chambers, can deny, in this proceeding, the right of the complainants to receive the whole of the sum devised them.

But again, I hold that no one but the State, as a sovereign, can call the plaintiffs to account for receiving, or holding, a larger amount of property in value than is limited in their charter.

This [the recent act of assembly] is tantamount to a license by the Crown, and we have seen by the case from 3rd Vesey, jr., and that from Merivale, that a license from the Crown will enable a corporation to hold more property than the amount to which it was originally limited (though the license was obtained after the death of the donor), upon the principle that, by the devise or purchase of more property than they were allowed to hold, the legal estate vested in the donee, subject to the will of the Sovereign.

It is further objected, that the act of '56 could not divest the next of kin of the interest which vested in them at the death of the testator. The above cases show that no interest vested in the next of kin, for it is decided in them, that the legal estate vested in the donees. But there is another answer to this claim of the next of kin. It is in *general* true that a devise ought to take effect on the death of the testator; but a devise to a collegiate corporation, not then in existence, *may* be good. Grant on Corporations, 123; *Attorney General v. Downing*, Wilmot's notes, 11 and 13. In that case, the devise was to a corporation, to be established in the University of Cambridge, and to be named after the testator, Downing College, in case the Crown should grant a charter incorporating the same, and a license to hold land in mortmain. The devise was held to be good. Here, the corporation was in full existence at the time the will was executed and when the testator died. The result of the cases to which reference has been had, is that a corporation may take more than the limit in their charter, but they cannot hold it unless they obtain an extension by the Crown. Grant, 104. No right to any interest then, according to the authorities, did or could vest in the next of kin.

If the charter has been violated, no one but the sovereign can claim the forfeiture; and as the sovereign, by the act of '56, has waived its

right to vacate the charter, if there was any violation of it by the corporation, the right of the plaintiffs to receive the donation from the executor, is complete, and put beyond all doubt in my estimation.

PER CURIAM. Decree according to the opinion of the Court.

IN THE MATTER OF THE ESTATE OF JOHN MCGRAW.
IN THE MATTER OF THE ESTATE OF JENNIE
MCGRAW FISKE.

1888. 111 *New York*, 66.¹

APPEAL from a judgment of the Supreme Court, which reversed a decree made by the Surrogate of Tompkins County on the settlement of the account of Douglass Boardman, executor of the will of Mrs. Jennie McGraw Fiske. The will of Mrs. Fiske directed that her estate "be converted into money, or available securities, as soon as can be done, having in view its best interests and results." After numerous bequests including a bequest of \$250,000 to Cornell University in trust, the will contains the following residuary clause: "I give, devise and bequeath all the rest, residue and remainder of my property (if any there shall be) to Cornell University, aforesaid, to be added to the 'McGraw Library Fund' aforesaid, and subject to the trusts, purposes, uses and conditions hereinbefore prescribed for said fund."

The Revised Statutes provide that a devise of real estate may be made to every person capable by law of holding real estate; "but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." (2 R. S. 57, ss. 1, 2, 3.) The Revised Statutes also enact, that the trustees of every college chartered by the state shall have power "to take and hold, by gift, grant, or devise, any real or personal property, the yearly income or revenue of which shall not exceed the value of twenty-five thousand dollars." (1 R. S. 460, ss. 31-37.) Cornell University was incorporated by chapter 585 of the Laws of 1865. Section 5 of the charter is as follows: "Sec. 5. The corporation hereby created may hold real and personal property not exceeding three millions of dollars in the aggregate."

The husband, next of kin, and heirs at law, of Mrs. Fiske, contended that Cornell University, at the date of Mrs. Fiske's death,

¹ Statement compiled from statement and opinion in 111 *N. Y.* 66, and statement in 45 *Hun*, 354. Arguments and portions of opinion omitted. — *ED.*

already owned property exceeding, in the aggregate, three millions of dollars.

The amount of Mrs. Fiske's estate at the time of her death, as found by the Surrogate (including a trust fund created under the will of John McGraw, which the Surrogate held was part of the estate of John McGraw, but which Mrs. Fiske had a right to dispose of by will) exceeded two millions of dollars. After deducting the legacies to parties other than Cornell University, there was a balance of more than one million which would go to the University if the will were carried out.

The Surrogate decided that a decree should be made:

1. That the account of the executor be allowed.
2. That the executor pay over to Cornell University the sum of \$141,676.72, being the balance on hand and ready for distribution.
3. And adjudging that Cornell University is the owner and entitled to all the rest, residue and remainder of said estate, and directing said executor to pay the same, when sold, to Cornell University, in money or in such other form, or at such other time, as may be mutually agreed upon between Cornell University and the executor.

The decree of the Surrogate was reversed, upon appeal, by the General Term of the Supreme Court in the Fourth Judicial Department. (Reported 45 Hun, 354.) The case was then taken, by appeal, to the Court of Appeals.

E. Countryman, and *S. D. Halliday*, for appellants.

Esek Cowen, and *George F. Comstock*, for respondents.

PECKHAM, J.

I think the fifth section of the charter gives the measure of the power of the university to take as well as to hold property. The language is an authority as well as a limitation. It is an authority to hold more than the Revised Statutes permitted, but it shall not be permitted to hold more than a certain specified amount. And if there were nothing said on the subject of property in the charter, I think the Revised Statutes as to the limitation for colleges would apply. Reading the language in the charter, it is difficult to imagine a holding without a previous taking of property, and the counsel for the appellant admits that if there were no other statute providing for a taking of property, the language of the fifth section of the charter would necessarily imply a right to take in order to hold.

The counsel states accurately the law of mortmain in England and its consequences of possible forfeiture of the estate granted, and, until forfeiture, the vesting of the title in the corporation indefeasible, except by the re-entry of the person entitled to take it by reason of the forfeiture. But the circumstances under which lands are held by citizens of New York, where their tenure is so wholly different from that which prevailed in England when the early mortmain acts were

enacted, render any argument in regard to those acts and their effect totally inapplicable to the case of a corporation of this state. Taking the law as it exists in our statutes, including the special provision upon the subject in the charter of the university, it seems to me that the provision therein, limiting the holding of property, is, as I have said, a restriction also upon the power to take in excess of the specified amount.

The nature of the tenure of real property at the time of the passage of the early mortmain acts in England bears no resemblance to the tenure by which a citizen of this State holds lands. Here there is no vassal and superior, but the title is absolute in the owner, and subject only to the liability to escheat. (Const. of N. Y., art. 1, § 13.) The escheat takes place when the title to lands fails through defect of heirs. (Const. of N. Y., art. 1, § 11.)

A devise to a corporation which is forbidden to take (or forbidden to hold, *if the word*, under the circumstances of the case, is construed to include a taking also) does not, therefore, give a title subject to the right of some superior to claim a forfeiture of the land; but if it be in violation of a statute, I think the devise is void and the land descends to the heir or residuary devisee.

Whether the legislature, when using language providing for a limitation upon holding property, meant to permit an unlimited taking, is a question of legislative intent; and I think the general inference would be, in the absence of some plain and controlling circumstance to the contrary, that the legislative body meant to limit a taking as well as a holding beyond the specified amount.

The counsel for the appellant does not claim that this property was itself forfeited to the state, if the state should choose to enforce the forfeiture. His claim is, as I understand it, that if the university exceeded its limitation by holding more property than it was allowed by law to hold, a cause of forfeiture of the charter was thereby created, and that in enforcing such forfeiture, after the payment of the debts of the corporation the rest of the property would (as he insists) probably go to the state because there would be no living claimant to it who would have any right to acquire it. A forfeiture the state may claim and may enforce at pleasure, when the occasion arises, but it is a forfeiture of the charter and not a forfeiture of the property held by the corporation. It is further claimed that this distinction between the right to take and the power to hold property is one which has been admitted and enforced in the courts of England, of this state and of the other states of the union for a long number of years; and that there is no reason why effect to such a distinction should not be given in this case, the result being, as is stated, that the corporation has an unlimited right to take property and also an unlimited right to hold it.

against any one but the state in its capacity of sovereign. There is undoubtedly a distinction between the right to take and the power to hold property under some circumstances, the only question being whether the legislature had such distinction in mind and meant to provide for it in the case in hand. It is said that an alien has the right to take property by purchase, but he cannot hold it as against the state. That is so. He takes, however, a defeasible title, good as to all but the sovereign power, which must take it upon office found or by escheat. (*Wright v. Saddler*, 20 N. Y. 320.)

In such case it is not exactly an accurate description of the alien's title to simply say that he can take but cannot hold. That is a contradiction in terms. If he take, he must hold, if for but a fractional part of a second of time. The expression is but a short one for the statement that he cannot hold, as against the claim of the state, where properly made and enforced. The same expression is used in the case of a corporation under the mortmain laws, that it can take but not hold, the meaning being that it cannot hold as against the claim for forfeiture when made by the next superior lord of the grantor of the lands. That the words lose all their meaning when wrenched from the circumstances under which they were used, and applied to corporations existing by virtue of the laws of this state, seems to me a plain proposition.

[The learned Judge here commented upon various cases cited by the appellants.]

In the case of *Vidal v. Girard's Executors* (2 How. [U. S.] 127), the trusts created by the will of Stephen Girard were held valid, and the court said that in such a case, if the corporation were incompetent to execute them, the heirs could not take advantage of such fact, as that could only be done by the state by *quo warranto* or other judicial proceeding. This is upon the ground that the trust was a valid trust, and if so, and the corporation, as such, had no power to execute it, the trust did not, for that reason, fail, but upon the failure of the corporation for lack of power, to execute it, a court of equity would appoint a new trustee. Of course, the heirs had no interest in the question when once the trust was declared valid, whether the corporation was exceeding its power in taking upon itself the execution of the trust or not. They had no title to or any further interest in the property. They stood, therefore, in respect to the corporation, as any other strangers. The case does not aid the appellant upon the matter under review.

The cases of the *Elevated Railroad* (70 N. Y., 327, 338) and *Moore v. Brooklyn, etc., Railroad* (108 id. 98, 104) are cited to show that none but the sovereign can take advantage of a forfeiture of the charter, and that must be in a direct proceeding against the corporation. The principle is undenied. But in a case like this it is no forfeiture that is being insisted upon. It is simply a question of title to the pro-

perty, and, provided it has not been legally devised or bequeathed, it necessarily vests in the heir or next of kin.

But it is said that where property is given to a corporation which has power to take or hold under some circumstances, the title vests in the corporation, for otherwise the state would never obtain the right to forfeit even the charter for a violation thereof. The argument is, the corporation would answer a claim to forfeit the charter by the fact that the charter precluded it from taking such property, and, therefore, as it could not, it had not done so. I do not see the force of the argument. The charter may preclude the rightful taking of the property by the corporation, and may prevent the legal title from vesting in it, but that has nothing to do with the fact that, nevertheless, the corporation has, as a physical act, taken the property and may be insisting upon its right to keep it as matter of law. In such case can there be any doubt that the corporation has taken and is holding the property as its own and in defiance of the charter, and that it may be punished by having its charter forfeited, although the rightful owner of the property may thereafter obtain his own? The fact that he does obtain it is no answer to the other fact that the corporation had taken it, nor is it any legal answer to the claim of forfeiture of the charter, on the part of the state, that it was unsuccessful in continuing to hold the property against the charter provisions.

Although we never adopted or enacted the English statutes of mortmain, yet in this, as in other states, we have a decided mortmain policy. It is found in our statute in relation to wills, prohibiting a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise.

The counsel claims, however, that a devise to a corporation vests the title in it, so far as the question of capacity is concerned, whenever it would in the case of a sale for a valuable consideration. Hence he says that the cases of sales above cited are decisive of this, if they be admitted as well decided. In the case of an executed sale, however, the question of *ultra vires*, as set forth in the modern cases, comes in play, and the question of a want of title in the corporation in such case would not be permitted to be raised by the grantor or his heirs, because it would be against justice and would accomplish a legal wrong. (*Whitney Arms Co. v. Barlow*, 63 N. Y. 62.)

The question of an executed gift without consideration by a donor, by an absolute delivery to a corporation without power to take, is also instanced, and the question is asked whether the title vests in such a case in the corporation so that the donor or his heirs could not recover it back, and if it do, the counsel asks where is the difference in the two cases. It is time enough to decide such a case when it arises. But it seems to me there is a decided difference. In the one case the gift is made *inter vivos* by the absolute owner, and it is made effectual as to him by a delivery. In such case it would seem that *he* stands in no

position to ask the aid of the court to get him out of a situation into which he voluntarily entered with his eyes open, and the court might well say to him that he stood in no position to attack the right of his donee to property which he freely and absolutely gave it. As to his heirs it could be said that their ancestor had made a disposition of property which was absolutely his own in his life-time, and in such a way that he could not question its validity, and that as *he* could not, they succeeding only to his rights, were alike disabled.

In the case of a devise, however, the case is essentially different. The will does not take effect until the testator's death, and then, if his property is not legally devised or bequeathed, no title vests for a single moment in the devisee or legatee, but it vests instantly in the heir or next of kin; and the corporation claiming under the will asks the aid of the law to give the property to it, and in so doing it must show the authority it has to take. And if there were only a prohibition in words against *holding* the property, would the law not be doing a vain thing in handing it over to a corporation which by the very fact of holding would render itself liable to have its charter forfeited on that account? Would not the prohibition against holding be properly and necessarily construed as a prohibition against taking also?

Is not this an argument against the right of the corporation *to take*, if by *holding* it is thus rendered liable to such a penalty? And is it not an argument in favor of the construction of the language in the charter that the limitation upon the power to hold property is, under all the circumstances, a limitation upon the power to take any more than it can legally and properly hold?

[After referring to the fact that the legislature, subsequently to the death of Mrs. Fiske, passed an act which took away any limitation on the power of the university to hold property.]

However perfect may be the waiver in the act alluded to, of the right of the state to forfeit the charter of this university on account of any alleged violation thereof, such act can, of course, have no possible effect upon rights of property which vested at the death of Mrs. Fiske and before the passage of the act in question. (*White v. Howard*, 46 N. Y. 144.)

This will devises no real estate to Cornell University. . . . [The will] directs that the estate of the testatrix shall be converted into money or available securities by her executor as soon as it can be done, having in view the best interests of the estate. This direction to convert operated as an equitable conversion of the estate of the testatrix into money or available securities, and hence no real estate in other states has been devised by her to the university. . . .

Upon a review of the whole question as to the proper construction of the legislation, general and special, affecting this university, I am

of the opinion that it had no power to take or hold any more real and personal property than \$3,000,000, in the aggregate.

Second. Coming to the conclusion I have, on the first branch of the case, it becomes necessary to examine the second and only remaining question, viz.: Does this property, if taken and held by the university, exceed the amount which by law it can hold?

[The court *held*, that the property of the university, at the time of the decease of Mrs. Fiske, amounted to more than "its permitted aggregate"; and that, under such circumstances, the university could not take the various legacies bequeathed to it by her will.]

Judgment of General Term affirmed.

All concur, except FINCH, J., taking no part.

FARRINGTON v. PUTNAM.

1897. 90 *Maine*, 405.¹

BILL in equity, by heirs of Ira P. Farrington against the executors of his will and the Maine Eye and Ear Infirmary.

Farrington, by his will and codicil (duly admitted to probate), left two thirds of the residue of his estate to the Maine Eye and Ear Infirmary, to be held in trust and the net income applied to the charitable purposes of the corporation. The Infirmary is a charitable corporation organized under the general statute of Maine. R. S. chap. 55. Section 4 of the chapter prescribes as follows: "Such corporations may take and hold by purchase, gift, devise or bequest, personal or real estate, in all not exceeding one hundred thousand dollars in value, owned at any one time, and may use and dispose thereof only for the purposes for which the corporation was organized." The constitution of the Infirmary, a public record, declares the purpose of the institution as follows: "The object of the corporation shall be the establishment and maintenance of an infirmary in Portland, Maine, where a daily clinic may be held for the treatment, free of charge, of poor persons throughout the state, suffering from diseases of the eye and ear."

The bill alleges that the Infirmary had at the death of the testator property to the full amount of one hundred thousand dollars in value. . . . Demurrers to the bill were sustained in the court below, and a decree was made dismissing the bill. Plaintiffs appealed.

Orville D. Baker and Clarence Hale, for plaintiffs.

Even in the case of deeds, so long as anything remains to be done by act of law, or by assistance of the court, to perfect even the mere possession in the grantee, it is more than doubtful whether the court ever lends that necessary aid to accomplish the violation of the statute;

¹ Statement abridged. The greater part of the opinion is omitted. — *Ed.*

and no well considered case will be found, or has been cited, where the court has sustained an action on such a deed, unless the grantee has already obtained actual possession as well as title.

As to the cases cited by the defendants, it is to be noted: first, that the tribunals themselves are of little authority; second, that the distinction between title and possession was not brought to the court's attention, nor in any way passed upon as a part of their decisions.

In the case of wills, as under the statutes of Maine, affirmative acts and decrees of the court are necessary to perfect and consummate the title, first, by approval of the will; second, by decree of distribution, and, third, by sustaining the direct suit, if the executor declines to pay. There is no possible ground, either in law or equity, on which the court will lend the aid of its decrees to perfect an incomplete violation of the statute and of the policy of the law, and thus make itself *particeps criminis* in the illegal acts.

PETERS, C. J.

The question on the first branch of the case, therefore, is whether these devises and bequests are absolutely void as the complainants contend, or whether they are merely voidable according to the view of the question taken by the respondents. After very much examination of the authorities pro and con, and careful consideration of the principles which affect the respective positions of the parties, we feel forced to the conclusion that the position advocated by the complainants ought not to be sustained. We feel very much impressed with the theory, stated in many of the cases, that a charter is a contract between the state and the corporation; and that for any misuse or abuse of its privileges or powers the corporation is amenable to the state only, no individual having anything to do with the question. As applicable to the present case, the principle is that, if the infirmity, by accepting these bequests and devises, increases its property ever so much in excess of the amount in value which the statute allows it to possess, it would be a transgression of the law which the state can prosecute or not as it pleases, and the heirs of the testator have no interest therein. As long as the state does not interfere for the violation, it waives it and permits the infirmity to retain the property.

The general statute under which this infirmity was organized is not expressly prohibitory, but rather regulative and directory. No penalties are attached and none intended more than a possible forfeiture of the excessive property received, or of the charter, or of one or both. This interpretation of the statute cannot by any possibility be harmful to the community, as the state can make it as stringent as it pleases at any time.

It will be noticed that most of the authorities, on which the complainants rely, concede that the rule which we would apply to devises

is at all events applicable to gifts by deed, the argument being that in such a case as this a deed would be valid and a devise void. It seems inconsistent that such potential consequences should attach to the mere form of transmitting the property. We do not appreciate the justice of saying that a deed of property delivered by a donor on the day of his death to a corporation would be good, and a devise of the same property made on the same day would be bad. But the argument by the complainants is that, in the one case, the transaction is executed and, in the other case, that it cannot be considered as executed without a resort to the forms and assistance of the courts. We think the whole thing involves a distinction without a difference, a formal but not substantial distinction. Each mode of transfer needs the protection and aid of the law to render it operative. In the first place, the will must be probated, it is said. But on that question no inquiry can be instituted to see if there be any impropriety in any particular devise or bequest. The residuary bequest in this will is fair and proper on its face, and that is all that is required. The act of probating the will is the probating of all its parts. A devise of real estate vests such estate at once in the devisee, the title of such devisee being liable to be defeated if the estate be necessary for the payment of debts or the expenses of administration. Section 15, Ch. 74, R. S., reads as follows: "No will is effectual to pass real or personal estate unless proved and allowed in the probate court." This will has been approved by the probate courts below and above with no questions or exceptions thereto pending. But it is said the bequest of the personal estate cannot be carried into effect until a distribution has been ordered and the executors' accounts have been approved. We think that even this fine technicality may be avoided by the executors, if need be. They would be justified in paying all the property left in their hands as residuary estate without any order therefor, should the devisees be willing to accept it and discharge the executors from their responsibilities. A good many estates are settled by the parties interested without any aid or order from the probate court.

The foregoing reasoning only serves to illustrate the unsubstantial foundation upon which it is endeavored to raise a technical excuse for pronouncing a deed voidable and a devise absolutely void. The true and conclusive answer, however, to this indefensible position of the complainants is that it is utter assumption on their part in declaring a devise like this to be void, when it is voidable merely, and can be rendered void in no way other than by the act of the government itself. No wrongful act by a corporation renders its charter void or creates any forfeiture without proceeding by which such forfeiture shall be established. A cause for forfeiture is not itself forfeiture. The same section which prescribes the amount of property which this corporation may hold, also declares that it may use and dispose of the same for the purposes for which it was organized. Suppose the corporation wrongfully uses or disposes of its property, could any party but the state intervene to punish the corporation for such transgression?

Now what is there illegal, let us ask, in this court or in the probate court below acting in the furtherance of bequests that are simply voidable and consequently valid until they have been declared to be otherwise upon the intervention of the state? If the state has the exclusive privilege, as it has, of rendering the voidable bequest void, what is there wrongful in our regarding it as sound and sufficient while the question of its validity is not acted upon by the state, or the error is waived or permitted by the state? What right has the judicial branch of the government to dictate what the state should do against its will or its policy, and decide a question for the state which the state can better decide for itself? What right has the court to deprive the state of all opportunity to determine whether it will thus severely punish this corporation for the mistake of the testator or will waive or overlook it? Certainly the state should not be prevented from making such election. If courts at the instigation of heirs can refuse to act upon voidable bequests as valid until avoided by the state, then, as a matter of course, the state can practically never have any opportunity to exercise its discretion in such a case any more than as if such right never existed, and the court would be assuming the prerogative of really acting in opposition to the state.

The complainants also rely very much on the Cornell University case, reported in 1888, under the title of *Matter of McGraw*, 111 N. Y. 66, a strongly stated case and in point here, excepting as the New York policy differs from the policy maintained elsewhere, and as the municipal law there differs from the statutes of other states and especially from the statutory system of our own state. It is there held that such devises and bequests as these are absolutely and irrevocably void, and in this respect the case is not wholly consistent with the views expressed by the same court in the Chamberlain case already commented on, and is in great advance of any doctrine expressed in any previous case in that state. The result is reached by an interpretation "of the general statutes of the state relating to the organization and holding of property by corporations of the class of Cornell University as the same have been affected by the terms of the special charter granted to it." While in our own state we have no statute affecting the question outside of the terms of the corporate charter itself, or of the general law authorizing the charter, the New York code contains clauses touching the ability of corporations to acquire property which her court construes to be expressly and utterly prohibitory. The provisions are of themselves severe and they are also strictly and severely construed by the New York Court. This same case came before the Supreme Court of the United States afterwards, and that court declined to review the decision of the New York Court of Appeals upon the ground that no federal question was presented, inasmuch as the decision sought to be reviewed was based upon the charter of the university and the municipal law of the state of New

York. *Cornell University*, 136 U. S. 152. The statute of wills in New York is disabling and restraining in its character and prohibits a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise. Her statutes on analogous subjects have been restrictive and her decisions have been accordingly.

[In *Hanson v. Little Sisters of the Poor in Baltimore*, 79 Maryland, 434, the court said:] "The contrary doctrine would make it very hazardous to take title from a corporation with such a limitation on its charter, and, if the objection could be made by any one, title to property once held by such corporations would cease to be marketable, litigation would be promoted, and courts would be constantly called on to decide the very difficult question of fact as to whether the property of a corporation does or does not exceed in value the charter limits. In the case now before us, the estimates of the witnesses differ greatly, and a devise or bequest would be held valid or void according to the estimate adopted by the court."

The counsel for the present complainants argues that the objection of inconvenience should have but the slightest influence on a question where so much principle is involved. We think, however, that the position of the Maryland court in this respect is not to be underrated. Certainly, titles affected in the way above-named would be much more hazardous if a devise of the kind be declared void instead of voidable, for a devise to all intents and purposes void must remain so through all the mutations of ownership, and the heirs might never be shut out from reclaiming the property thus illegally devised. Many fixed principles of the law have been established on grounds of policy merely, even by the creation of legal fictions if necessary to reach a just result. There are policies within a policy, questions within a question, the smaller controlling the greater question as the rim of a wheel is supported and controlled by its spokes. The difficulty of applying the restrictive rule is a circumstance worth consideration.

[The learned Judge quotes, *inter alia*, the following passages from Pritchard on Wills, section 153, note 13:] "The exception contained in the English statute of Wills was incorporated into the New York statute of Wills, and under it, it was held that a devise of land directly to a corporation was void, but that a devise to a natural person in trust for a corporation was good. *McCartee v. Orphan Asylum Soc.*, 8 Cowen, 437 (18 Am. Dec. 516). A later statute of that state provides that devises of land may be made to every person capable by law of holding real estate, but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise. 2 R. S. (N. Y.) 57, §§ 1, 2, 3. This statute renders devises directly or indirectly to a corporation void in the prohibited cases. *Dunning v. Marshall*, 23 N. Y. 366; *Bascom v. Albertson*, 34

N. Y. 584; *King v. Rundle*, 15 Barb. 150; *Matter of McGraw*, 111 N. Y. 66, 84. This statute operates upon the testamentary power. . . . In *Heiskell v. Chickasaw Lodge*, 3 Pickle, 668, 686, it is stated that there is a distinction between the case where a corporation is actually holding property in excess of the limitation of its charter and the case where a devise is made to it and the property devised has not yet come to its possession, and it is said that in the first case no one but the state can raise the question or enforce the forfeiture; but in the second case the heirs or residuary legatee may raise the question, because the gift would be void and the property would go the same as if it had not been made. Dickinson, Sp. J., cites *Matter of McGraw*, 111 N. Y. 66, to sustain this distinction. He seems to have overlooked the fact that the statute of Wills in New York expressly declares such devises void. There can be no objection to the heirs making the question where the testamentary power is thus expressly limited by statute. In the absence of such a statute the devise is not void as fully shown by the authority cited above, and the heirs could no more attack it before the corporation went into the possession of a realty devised than afterwards."

The complainants quote in their brief an article in the Harvard Law Review (January, 1896), in which the writer, who was said at the argument by counsel for complainants to be a recent graduate of Harvard Law School, favors, upon the admittedly doubtful question, the view taken in the McGraw case and not that adopted by the United States Supreme Court. But the writer makes no allusion to the fact that the opinion in his favorite case was based on certain stringent statutes of New York affecting the testamentary capacity of the testator to give, as well as upon the lack of ability in the donee to receive.

How little authority then have the complainants to rely on outside of the McGraw case in New York? We have no reason to doubt the correctness of the result of the decision in that case as based upon exceptional statutes in that state not existing elsewhere. And, should we undertake any criticism of that opinion, it would be that while the case was decided upon the statutory policy of that state, the opinion endeavors to bend into line with its policy, the policy of other states where no such peculiar conditions are found to exist.

Deeds to aliens may not be of principal importance, but it seems to us that devises to aliens, which are good at common law, are clearly cases in point and of more consequence as precedents than any other analogous authority. Does not the will containing a devise to an alien have to be approved with the same formalities as are required of the will of the present testator, and is the land devised any more in the possession of the devisee in the one case than in the other? It is

argued in behalf of complainants that there is this distinction between an alien as devisee and a corporation as such; that in the case of an alien the disability is personal and does not attach until proved by some direct and not collateral proceeding, as bankruptcy must be proved in the case of a bankrupt or as felony must be proved in the case of a felon, before the full consequences of such a condition fall upon them. There must be a conviction. Is not that the very contention of the respondents here? What is there in this will which should lead a court to establish any illegality except by a direct proceeding for the purpose? And why should the law be any more generous to a bankrupt or a felon in the dispensation of its favors than to a charitable association? At common law, and by the statute law of some of the states, an alien can take real estate by devise and hold the same until office found to take it away from him. It is also argued for the complainants that executory contracts of an illegal nature where the illegality is participated in by both parties cannot be enforced by one party against the other, the parties being equally in fault. That principle is not applicable here. The executors and the corporation are not parties contending against each other. They are on the same side of this suit. It is admitted by the corporation that it would be a transgression of the law of its organization to accept the bequests unless the state actively or passively consents to it, and its silence is its consent. But what wrong has the testator committed by his act? The only contract that can be pertinently discussed here is that between the state and the corporation, and the state can do no wrong.

This conclusion renders it unnecessary and inexpedient to discuss the further contention of the respondents that the bequests are valid in equity if not at law, upon the maxim that no legal trust of a charitable nature shall fail for want of a competent trustee, and that if this corporation cannot act some other party may be appointed by the court that can.

Exceptions overruled.

*Appeal dismissed, and decree below affirmed.*¹

In the omitted portions of the opinion the learned Judge comments on a very large number of cases. Among the cases quoted as favoring his view are *Jones v. Habersham*, 107 U. S. 174; *Hanson v. Little Sisters, &c.*, 79 Maryland, 434, and *Hamsher v. Hamsher*, 132 Illinois, 273. The decision in *Wood v. Hammond*, 16 R. I. 198, "follows the opinion of the New York court in the McGraw case." — ED.

SECTION V.

Suits for Specific Performance of Contracts which are in Excess of Charter Authority; or for Declarations of Trust for Purposes in Excess of Charter Authority.

BANK OF MICHIGAN v. NILES.

1842. *Walker's Chancery Reports (Michigan)*, 99.

THE bill in this case was filed to obtain the specific performance of a contract entered into by the parties on July 1st, 1839. The complainants bound themselves to convey to defendant, within sixty days thereafter, certain real estate described in the contract, and to obtain from one Jeremiah H. Pierson a good and sufficient deed of the Rochester mill property, and convey to him three undivided fourth parts of it; and, in case a mortgage should be given by them on the mill property, for the purchase money, they covenanted to pay the incumbrance, and cause it to be discharged within five years. The defendant, in return, agreed to execute a mortgage to complainants for the purchase money to be paid by him, amounting to \$28,000, on the property to be conveyed, and on certain other property named in the contract. Within the sixty days, complainants purchased and obtained a deed of the mill property from Pierson, for \$5,000, which they paid and secured to be paid to him. They then made out and executed a deed to defendant for three-fourths of it, with the other property they were bound by the contract to convey to him, and were ready and willing to perform their part of the contract.

The defendant demurred.

G. M. Williams and A. D. Fraser, in support of the demurrer:

J. F. Joy, contra.

THE CHANCELLOR. The first objection made by defendant is, that the bank had no authority under its charter to make such a contract as that disclosed by the bill; and that this Court will not, for that reason, decree a performance of it.

The third section of the act of incorporation concludes with these words: "The President, Directors and Company of the Bank of Michigan shall be in law capable of purchasing, holding and conveying any estate, *real* or personal, for the *use* of the said corporation." By the ninth section it is provided, "That the lands, tenements and hereditaments, which it shall be lawful for the said corporation to hold, shall be only such as shall be required for its accommodation in relation to the convenient transacting of its business, or such as shall

have been *bona fide* mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments, which shall have been obtained for such debts."

The power given by the third section to purchase, hold and convey real estate, is limited by the ninth section to specific objects. Taking the two sections together, the intention of the legislature is clear, and but one construction can be given to them. It was intended that the corporation should have power to purchase real estate for the convenient transaction of its business, or to secure a debt; but not for the purpose of investing its capital, or of speculating in lands, or of buying them merely to sell again. I have no doubt this is the true construction of the charter. A different construction would enable the corporation to buy and sell real estate at pleasure, and render entirely nugatory the restriction imposed by the ninth section. The corporation, then, exceeded its powers, and contracted to do what it had no right to do under its charter, when it covenanted to purchase the mill property of Pierson, and convey three-fourths of it to defendant. It was an agreement to buy real estate of one individual to sell to another; — a contract to violate its charter, by embarking in a business with which it had no right to meddle; — a contract which, for that reason, this Court cannot, consistently with equitable principles, assist the complainants to carry into execution. Equity will aid no one in doing that which is unlawful.

The purchase of the mill property of Pierson for \$5,000, after the contract was made, makes no difference; for it was done under the contract, and in part performance of it. The case of *The Banks v. Poitiaux*, 3 *Rand. R.* 136, goes no further than this, that the corporation having purchased the land, might make a deed of it; not that it might make a contract with A. to purchase the lands of B., and sell them to A., which is the case before me.

It is unnecessary to decide the other questions made on the argument.

Demurrer allowed.

NOTE. This case was affirmed on appeal. [1 *Douglas, Michigan*, 401.]

CASE *v.* KELLY.1890. 133 *U. S.* 21.¹

APPEAL from the U. S. Circuit Court for the Eastern District of Wisconsin.

The plaintiff, Case, receiver of the Green Bay & Minnesota R. R. Co., was ordered by the Court (in a suit to foreclose a mortgage given by the R. R. Co.) to take possession of all the corporate property, and was authorized to bring suits in the name of the company. Case, as receiver, brought the present bill in equity, stating that he sues in behalf of the company and as receiver.

The allegations of the bill are, that the defendants Kelly, Ketchum and Hiles, who were officers of the railroad company during its period of construction, had procured numerous donations of land from citizens who were interested in the construction of the road, along its line, intended to be for the use and benefit of the railroad company, and to assist it in such construction. The fundamental allegation of the bill is, that these defendants, representing to the persons who made the donations that they were officers of the road, and soliciting these grants for the benefit of the road, took the conveyances to themselves individually; that they did this in a fraudulent manner, by making the grantors in the conveyances believe that they, as the officers of the company, could receive the conveyances for the benefit of the road; and that either the grantors did not really know to whom the conveyances were made, or were induced to believe that when made the grantees held the lands as a trust for the benefit of the road. These defendants not recognizing this trust, and the conveyances on their faces being merely conveyances to the individuals, either separately or collectively, to wit: to Ketchum, Kelly and Hiles, who now refuse to convey to the company or to admit its right to the lands, this suit is brought to have a declaration of the trust made by the court and a decree ordering conveyances by the defendants of the land to the corporation.

It is further alleged that the mortgage in process of foreclosure in the court under which Case is acting as receiver covered all the lands of the corporation, and would cover these lands if the title of the corporation in them was established.

Answers were filed, and evidence taken. Upon the hearing, the Circuit Court was of opinion that the aforesaid conveyances were made by the grantors and received by the defendants as contributions to the railroad company to aid in the construction of the road. The Court was also of opinion that the company could only receive and hold lands for the necessary purposes of the road. The decision was, that plaintiff was entitled to recover the title and possession of all such lands as are

¹ Statement abridged. Arguments and part of opinion omitted. — *Ed.*

required by the company for necessary railroad purposes (such as right of way, depots, &c.); and that the bill, as to all other portions of the land described therein, should be dismissed.

Walter C. Larned and Herbert M. Turner, for appellant.

George H. Noyes, for Hiles, appellee.

MILLER, J. [After holding that the company had no authority to receive an indefinite quantity of lands, whether by purchase or gift, to be converted into money or held for any other purposes than those mentioned in the act of incorporation]

It is next objected to the principle adopted by the court that the limitation upon the power of the corporation to receive land is one which concerns the State alone, and the title to such lands in a corporation can only be defeated by a proceeding in the nature of a *quo warranto* on behalf of the State. The case of *National Bank v. Matthews*, 98 U. S. 621, is strenuously relied on to support this view. We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids.

We are urged to consider that if this decree is affirmed dismissing the bill of the railroad company, the defendants will be left in the possession of property fraudulently acquired, of considerable value, for which they gave no consideration. The answer to this is, that such question cannot be raised by the plaintiff in this case, because, having no right to take the property, it is not injured by a decree of the court which fails to grant such right. The other questions must be between the defendants in this case and those from whom they took deeds of conveyance, or such other parties, public or private, as may show that they have an interest in the controversy.

The decree of the Circuit Court is

Affirmed.

MR. CHIEF JUSTICE FULLER did not hear this case and took no part in its decision.

SECTION VI.

Ultra Vires Contract remaining wholly executory on both Sides, or Executed only in Part by either Side. Action for Breach, or for Cancellation.

NASSAU BANK v. JONES ET AL. EX'RS.

1884. 95 *New York*, 115.¹

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 9, 1883, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term. (Reported below, 17 J. & S. 498.)

This action was brought against defendants as executors of the will of Daniel Jones to compel them to transfer and deliver to plaintiff fifty \$1,000 bonds and one hundred and twenty-five shares of the stock of the Denver and Rio Grande Railroad Company, or to account for and pay over the value thereof and all interest and dividends received by their testator thereon.

The material facts are stated in the opinion.

Samuel Hand, for appellant.

Martin J. Keogh, for respondent.

RUGER, Ch. J. The question involved in this case, as we regard it, is the right of a banking corporation chartered under the laws of this state to subscribe for the stock of a railroad corporation.

In the spring of 1879, the Denver and Rio Grande Railroad Company, being a corporation organized to construct railroads in Colorado and adjoining territories, with the view of raising money to extend its lines, published a circular, whereby it proposed in substance, to issue \$5,000,000, of its bonds, in sums of \$1,000 each, payable thirty years after date, with annual interest at seven per cent in gold, secured by mortgage upon its property; and to deliver one of such bonds together with five shares of its capital stock, of the par value of \$100, per share, to each and every person who should advance thereon the sum of \$900, reserving, however, the privilege to the railroad company, of withdrawing the proposition, when it should have received subscriptions to said loan, to the amount of \$3,000,000. This proposal was favorably received, and the loan was subscribed for by citizens and corporations in various States of the union, to an amount greatly exceeding the sum

¹ Arguments and part of opinion omitted.—ED

required by the railroad company. Among others the defendants' testator, one David Jones, subscribed for, and was awarded \$90,000, of such contemplated loan. It is claimed by the appellant, and was found as a fact by the trial court, that Jones undertook, by the authority and for the benefit of the plaintiff, to contract with this railroad company, for a loan, under its proposal, in the name of the plaintiff, to the extent of one-half of the amount which should be allotted to him; and by this action the appellant seeks to recover, from Jones' executors, among other things, the profits claimed to have been made by him upon its share of the transaction. The right to maintain the action seems to depend upon the power of the bank to enter into the proposed contract, for if it had no lawful authority to make such a contract it could not become liable to Jones upon its obligation to take and pay for the property contracted for; and consequently there would be no consideration for Jones' undertaking to subscribe for the benefit of the bank. Not only this, but the bank could not, by suit, enforce against any one an executory contract which it was unauthorized by its charter to make.

It becomes necessary, therefore, to inquire into the nature of the proposed contract, and the legal capacity of the plaintiff to transact business.

[After discussing these questions, the opinion proceeds as follows:]

For these reasons, we are of the opinion that the plaintiff was not only precluded by public policy, but was not authorized by the statute under which it was organized, to enter into any engagement as a stockholder in a railroad corporation.

The contract between the plaintiff and Jones was wholly executory, and nothing has occurred thereunder, preventing the bank from setting up its own want of authority to make such a contract, as a defense to any action brought thereon by Jones.

While executed contracts, made by corporations in excess of their legal powers, have, in some cases, been upheld by the courts, and parties have been precluded from setting up, as a defense to actions brought by corporations, their want of power to enter into such contracts (*Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258; *Whitney Arms Co. v. Barlow*, 63 id. 62; *Woodruff v. E. R. Co.* 93 id. 618), this doctrine has never been applied to a mere executory contract which is sought to be made the foundation of an action, either by or against such corporations. It was said by Judge SELDEN, in *Tracy v. Talmage* (14 N. Y. 179), "That a contract by a corporation, which it has no legal capacity to make, is void and cannot be enforced, it would seem difficult to deny." In *White v. Buss* (3 Cushing, 448), Chief-Justice SHAW lays down the rule as follows: "It is well settled by the authorities that any promise, contract or undertaking, the performance of which would tend to promote, advance or carry into effect an object or purpose which is unlawful, is in itself void and will not maintain an action.

Lord MANSFIELD, in *Smith v. Bromley* (Douglas, 696), says: "If the act is in itself immoral, or a violation of the general laws of public policy, then the party paying shall not have this action." In *Tracy v. Talmage*, (*supra*, 217), Judge Comstock says: "It is admitted that the contract of a corporation, which it has no legal capacity to make, cannot in its terms be enforced."

There is nothing in this case to exempt the plaintiff from the operation of the general principle determined in the cases referred to.

Jones owed no duty to the plaintiff, except that which sprang out of his engagement to purchase the stock and bonds in question; and that having failed on account of its illegality, left no enforceable obligation resting upon him. (*Levy v. Brush*, 45 N. Y. 589.) There is no pretext for the claim that the contract was in any respect an executed one, for Jones never even entered upon its performance. His subscription for the loan in his own name was in direct violation of the obligation which it is claimed that he had assumed; and it is that obligation alone which is sought to be enforced in this action. The bank, by the transaction in question, secured Jones' promise to do certain things, and has relied solely upon that promise. It has done nothing in performance of the contract, and, so far as it is concerned, the contract remains wholly executory.

Neither can Jones be treated as a trustee for the benefit of the plaintiff, a trust whereby it is attempted to accomplish an illegal purpose, is quite as objectionable as a direct contract to effect the same object.

The law does not raise an implied obligation to effectuate a purpose which is forbidden, and which cannot be effected by the parties through the agency of an express contract. (Perry on Trusts, § 214.)

The claim here is that a trust should be implied to enable the plaintiff to reap the profits from a transaction in which it was not authorized by law to engage. We have found no authority which supports such a claim and are unable to discover any ground upon which this action can be maintained.

It follows that the judgment should be affirmed.

All concur, except RAPALLO and EARL, JJ., dissenting.

Judgment affirmed.

JEMISON v. CITIZENS' SAVINGS BANK.

1890. 122 *New York*, 135.¹

APPEAL from General Term of Supreme Court in First Judicial Department, affirming a judgment in favor of defendant.

Francis C. Barlow, for appellant.

Benjamin H. Bristow, and *William D. Guthrie*, for respondent.

HAIGHT, J. The plaintiffs were commission merchants and members of the Cotton Exchange of the city of New York. The defendant was a savings bank and trust corporation organized under the laws of Texas.

This action was brought to recover commissions, and for money claimed to have been expended for the defendant on the purchase and sale of cotton futures.

The defense was that the defendant, as a savings bank and trust corporation, had no power or authority to deal in the purchase and sale of cotton for future delivery, or in contracts for the purpose of speculation; that in the transaction alleged in the complaint it acted as the agent of one Albert P. Clopton, of Jefferson, Texas, and that the fact that he was the principal for whom the defendant acted was disclosed and well known to the plaintiffs prior to the time of the transaction referred to.

Whilst the fact distinctly appears from the correspondence between the parties that the defendant was acting for "good responsible customers," the General Term was of the opinion that this defense could not be sustained for the reason that the defendant did not disclose the name of its principal at the time of the giving of the orders complained of for the purchase and sale of cotton futures. Had this defense been sustained, the principal and not the defendant, his agent, would have been liable. Without stopping to consider the evidence we shall assume that this defense was not established, and proceed to consider the question as to whether the defendant was liable as principal.

Transactions between the parties commenced in January, 1879, by a letter from J. H. Parsons, as cashier of the defendant, asking the plaintiffs the amount of margin and commission they required for the purchase of cotton futures. The plaintiffs answered, giving the amount, and this was followed by an order by telegraph from Parsons, as cashier, under date of February tenth, to buy 100 bales, June delivery, and on the same day he wrote the plaintiffs that the order was made for one of their customers who had deposited \$250, as per their favor of the twenty-seventh ult. Other orders followed, the final result of which was a loss, to recover which this action was brought. At the time Parsons was the cashier of the defendant, possessing the powers and duties incident to the office under the charter, constitution and by-laws, having the general charge of the business of the bank and the supervision of the

¹ Arguments and part of opinion omitted. — *Ed.*

concern, and inasmuch as the answer alleges that the transactions referred to in the complaint were had between the plaintiffs and the defendant acting as agent, we shall treat him as possessing all of the authority to act in the premises that the directors of the defendant had the power to give. This brings us to the question whether or not the defendant had the power to make the orders in question.

Whilst the buying and selling of cotton to be delivered in the future, may not ordinarily be immoral or prohibited by any statute, it is not included in the powers given to the defendant by its charter. The transaction in question was prejudicial to its stockholders and tended to endanger and destroy the safeguards provided for the depositors. The stockholders and depositors had the right to have their funds invested in accordance with the provisions of the charter and the Constitution and laws of the state, and in so far as this right was violated by the transaction in question it was a misappropriation of the funds and immoral.

It is contended that the defense of *ultra vires* is not available in this case, for the reason that the contract had been executed on the part of the plaintiffs and that the defendant is estopped from setting up the defense. In the case of *Whitney Arms Co. v. Barlow* (63 N. Y. 62) the plaintiff was a corporation organized for the purpose of manufacturing every variety of fire-arms and other implements of war, and all kinds of machinery adapted to the construction thereof. It entered into a contract with the American Seal Lock Company to manufacture and deliver 10,000 locks. The locks having been delivered, it was held that the contract was fully executed and that the plea of *ultra vires* would not prevail as a defense to an action brought to recover the contract price. We do not question the rule thus invoked. It has been repeatedly declared in other cases, as, for instance, in *Parish v. Wheeler* (22 N. Y. 494), in which it was held that a railroad company having purchased and received a steamboat could be compelled to pay for it, although the power to purchase such boat was not included in its charter. But this doctrine has no application to executory contracts which are sought to be made the foundation of an action, or to contracts that are prohibited as against public policy or immoral. (*Nassau Bank v. Jones, supra*; *P. C. & S. L. R. Co. v. K. & H. B. Co.* 131 U. S. 371-389.)

In the case at bar, the transaction as we have seen was not only immoral and in violation of the rights of the stockholders and depositors, but the defendant had received nothing by virtue of it. The cotton had been purchased by the plaintiffs in their own name, they taking title thereto and holding it upon the defendant's account. It was purchased under the rules of the Cotton Exchange of the city of New York in which the members doing business therein with other members act as principals and are liable as such. The most that can be claimed is that they held the cotton or the contracts therefor subject to the call or

order of the defendant. There had been no delivery of any cotton or property of any kind, or transfer of any title to such property to the defendant. If the steamboat had never been delivered to the railroad company so as to transfer the title thereto, or if the 10,000 locks had never been delivered to the American Seal Lock Company, very different questions would have been presented in the cases to which we have called attention. We consequently are of the opinion that under the circumstances of this case the defense of *ultra vires* is still available to the defendant.

The claim is made on behalf of the appellants that the defendant, in making the orders, acted as an agent for an undisclosed principal, and is, therefore, liable as such. If the defendant had no power to engage in the business as principal we do not understand what right it had to do so as an agent, but conceding that it was an agent and that the orders were made for and on behalf of Clopton then this action should have been brought against Clopton instead of the defendant. But it is claimed that the defendant neglected to disclose its principal at the time of making the orders and for that reason it is liable; but if it neglected to disclose its principal, so far as this action with the plaintiffs is concerned, it must be regarded as principal and liable as such, and if a principal then the question of *ultra vires* arises. The plaintiffs cannot sustain their action upon the two theories, for they lead in different directions. They cannot proceed upon the theory that the defendant was an agent, for the purpose of avoiding the question of *ultra vires*, and then upon the theory that the defendant was a principal, for the purpose of establishing a right to recover. Undoubtedly a person may in fact be an agent and still bind himself as a principal, but if he is proceeded against as a principal he is entitled to all of the rights and privileges that the law gives to a person occupying that position.

We consequently are of the opinion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

MCCUTCHEON v. MERZ CAPSULE CO.

1896. 37 *U. S. Appeals*, 586.¹

IN the U. S. Court of Appeals, Sixth Circuit. Before TAFT and LURTON, Circuit Judges, and HAMMOND, District Judge.

Appeal from U. S. Circuit Court for Eastern District of Michigan.

Bill in equity by Merz Capsule Co. (a Michigan corporation), against the U. S. Capsule Co., R. H. McCutcheon, its president, and various other parties. Cross bill by U. S. Capsule Co. against Merz Capsule Co. Evidence was taken and both causes were heard.

Two corporations (the Merz Capsule Co. and the National Capsule Co.) and two partnerships, severally engaged in the manufacture and sale of hard, empty gelatine capsules, entered into an agreement, dated Nov. 29, 1893, for the combination and consolidation of their several properties and business interests. They agreed to organize a new corporation for carrying on said business; the stock to be divided among the above parties. They agreed to convey their respective plants, machinery, &c. to the new corporation; the value of the real estate to be determined by appraisers if necessary. In payment for these conveyances each party was to receive from the new corporation mortgage bonds to the amount of the appraised value of the property thus conveyed; the mortgage to cover all the property of every kind belonging to the new corporation. It was also agreed that none of the above parties should hereafter engage in the manufacture or sale of empty gelatine capsules.

In pursuance of the above scheme, the parties organized a new corporation under the general law of New Jersey, called the United States Capsule Co. The capital stock of this new company was allotted to the above parties. The property owned and operated by each of the parties in making and selling hard, empty gelatine capsules was valued by appraisers, as provided in the agreement, and conveyances and bills of sale executed to the United States Capsule Company. The instrument of sale executed by the appellee, the Merz Capsule Company, bears date December 21, 1893, and recites a "consideration of \$15,000, and other good and valuable consideration." In point of fact this part of the transaction is yet incomplete. No mortgage has been made by the United States Capsule Company, and no bonds have been executed for the appraised value of this property as contemplated by the agreement, though the United States Capsule Company did give to the Merz Capsule Company a certificate, reciting that the latter company was to receive bonds to the amount of the appraised value of its property when the mortgage should be made and the bonds executed.

On the same day that the above-mentioned deed was made and

¹ Statement abridged. Part of opinion omitted. — Ed.

delivered the Merz Capsule Company accepted a lease upon its premises, machinery, plant, etc., in consideration of a nominal rent, the lease to terminate on January 15, 1894, and thereafter continued in the use and occupation of its property, operating the plant for the purpose of working up stock on hand not included in the sale. While thus remaining in the actual possession of its premises and manufacturing plant, the Merz Capsule Company determined to withdraw from its engagements and contracts with the other parties to the agreement, being advised, as the original bill alleges, that the contract then entered upon, and the conveyance in furtherance thereof, were unlawful and in excess of its corporate powers. The motive which led to this repentance is not of great importance, though the evidence seems to make it pretty clear that disappointment in obtaining the control of the new business led to serious doubt as to the validity of the arrangement. This determination was notified to the officers and directors of the new corporation, the stock certificates were tendered back and a complete rescission was demanded. This tender was refused and rescission denied. Having also given public notice of the invalidity of the instrument under which the United States Capsule Company asserted title and right of possession to its manufacturing plant, the Merz Capsule Company resumed its ordinary course of business as an independent manufacturing corporation.

On January 22, 1894, while thus in the full and peaceable possession of its premises and the use of its machinery and appliances, the defendants are shown to have made an entry upon those premises through the officers, agents and servants of the United States Capsule Company, under circumstances of considerable aggravation, for the purpose of removing the machinery and stock of the said Merz Capsule Company, and did actually tear down a part of such machinery and remove a part thereof from the premises, and were only prevented from completely dismantling the factory by an exertion of force.

Thereupon the Merz Capsule Co. filed its original bill against the U. S. Capsule Co., McCutcheon, *et als.*; alleging in effect that the aforesaid agreement was illegal and in excess of corporate powers; that defendants, for the purpose of compelling plaintiffs to carry out the scheme, threatened further trespasses, for which the plaintiffs' remedy in damages would be inadequate; and praying that the above agreements and conveyances should be cancelled, and defendants enjoined from interfering with the possession of plaintiffs' property and premises.

The U. S. Capsule Co. answered and filed a cross bill, setting up the said agreements and conveyances as legal instruments, and praying for their specific performance.

Upon full proof the U. S. Circuit Court made a decree, restraining the U. S. Capsule Co. from the commission of further trespass, declaring the several agreements *ultra vires* and illegal under the law of Michigan, and decreeing that the title to the disputed property is

quieted in the Merz Capsule Co. The cross bill of the U. S. Capsule Co. was dismissed.

The U. S. Capsule Co. *et als.* appealed.

Henry M. Campbell (*Russel & Campbell* were on the brief), for appellants.

Edwin F. Conely, for appellee.

LURTON, J. [The Court held, "that the agreement of Nov. 29, 1893, as to the Merz Capsule Company, and the subsequent conveyance and bill of sale to the United States Capsule Company made in furtherance of that agreement, are inoperative, null and void, as in excess of its corporate powers." "Being *ultra vires*, the consent of its stockholders cannot legalize or vitalize the transaction." The opinion then proceeds as follows :]

The final objection urged by the appellants is that, if the agreement between the Merz Capsule Company and its associates is subject to the objection that it was unauthorized by its organic law and contrary to the public policy of Michigan, the objection cannot be urged by that corporation as a ground for affirmative relief in a court of equity. Undoubtedly, if the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, and has not been repudiated by the defendant, neither a court of law nor of equity will lend its active assistance to the recovery of property or money paid on such a contract, or aid in bringing about its surrender or cancellation. The doctrine of the courts applicable was stated very aptly by Mr. Justice Gray, in *St. Louis, Vandalia and Terre Haute Railroad Company v. Terre Haute and Indianapolis Railroad Company*, 145 U. S. 393, 407, when he said : "The general rule, in equity, as at law, is *In pari delicto potior est conditio defendentis* ; and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 12 Wall. 349, 355 ; *Spring Co. v. Knowlton*, 103 U. S. 49 ; Story Eq. Jur. § 298. While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defense in a court of law ; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose."

But this rule, by which the defense of *particeps criminis* is sanctioned by courts, as stated by Lord Truro in *Benyon v. Nettlefold*, 3 Macn. & Gord. 94, 101, and approved by Lord Selborne in *Ayerst v. Jenkins*, is rested "on the grounds of public policy, namely, that those who violate the law must not apply to the law for protection." But in the case last cited Lord Selborne notices a very obvious limitation, by saying : "When the immediate and direct effect of an estoppel in

equity against relief to a particular plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy." L. R. 16 Eq. 275, 283.

The contract in the case at bar between the parties *in pari delicto* is in a large degree still executory. Though a deed and bill of sale have been executed and delivered in furtherance of the original agreement, possession has not been surrendered, and the bonds to be delivered in payment have neither been delivered nor executed. The conveyee under the deed has indeed applied to this court, through its cross bill, for the specific performance of the agreement by being placed in possession under the deed, and for an accounting with the appellee. There is an obvious distinction between the attitude of a complainant asking relief against an unexecuted agreement, illegal for reasons not appearing upon its face, and where it is sought to recover back money or property paid upon a contract fully executed. The cases stating this distinction are referred to and commented upon by Lord Cottenham, in *Simpson v. Lord Howden*, 3 Myl. & Cr. 97 *et seq.*, by Lord Selborne, in *Ayerst v. Jenkins*, L. R. 16 Eq. 275, and by Mr. Justice Gray, in *St. Louis, Vandalia and Terre Haute Railroad Company v. Terre Haute and Indianapolis Railroad Company*, 145 U. S. 393.

In *Whaley v. Norton*, 1 Vernon, 482, 483, the Master of the Rolls said "that there would be a difference in these cases between a contract executed and executory, and that this court would extend relief as to things executory, which if done, it may be might stand." The case of *Spring Company v. Knowlton*, 103 U. S. 49, is highly instructive, and supports the proposition that affirmative relief may be extended to one of the parties *in pari delicto*, where the contract is unexecuted and he is desirous of rescinding it, provided the contract was not one *malum in se*.

The specific performance sought under the cross bill has rendered necessary the expression of a definite opinion as to the validity of the contract thus set up by the United States Capsule Company. In view of this opinion, necessitating an affirmance of the decree, as far as it dismissed the cross bill, ought we to stop at this point and decline to grant any part of the relief sought by the appellee? The Merz Capsule Company does not seek to recover back either property or money paid or delivered under its agreement or deed. Before actually surrendering possession of its premises, machinery and appliances, or transferring its patents and processes, it repudiated the whole scheme and tendered back all that it had ever received, and has kept that tender good. But it has neither lost possession nor received the bond payment it was entitled to receive. Having given notice of its purpose to go no further in an illegal scheme, it remained in the peaceable possession of its property and in the ordinary conduct of its business. Without resorting to legal proceedings, the United States Capsule Company sought to obtain possession of the property of the recalcitrant grantor, and, when pre-

vented by force from accomplishing its unlawful object, avowed its purpose by a repetition of the trespass to obtain a possession which it could not secure by a resort to legal procedure. The effect of a continuance of these unlawful methods to obtain possession, as shown by the pleadings and proof, would be most injurious to the business of the complainant, and the remedy at law inadequate. Under all these circumstances, to hold that the complainant is estopped to rely upon the illegality of the agreement and conveyance to which it was a party would be to effectuate an unexecuted, unlawful object, and aid in the defeat of a legal prohibition. The door of this court should not be closed against one seeking to extricate himself from an unlawful connection, provided relief is sought without delay and before the contract is executed, or other persons have irrevocably acted in reliance upon its supposed legality.

The decree of the court declaring the illegality of the agreement of November 29, 1893, and of the deed of December 21, 1893, and restraining the appellants from interfering with the title or possession of the appellee under color thereof, should be, and accordingly is,

Affirmed. ·

SECTION VII.

Suit by Corporation on an Ultra Vires Contract which has been fully performed on its part.

MARBLE CO. v. HARVEY.

1892. 92 *Tennessee*, 116.¹

APPEAL from Chancery Court of Knox County. H. R. GIBSON, Ch. *Green & Shields* for Marble Company.

W. C. Kain for Harvey.

LURTON, J. The complainant is an Ohio corporation, and was organized under the general incorporation law of that State "for the purpose of cutting, dressing, manufacturing, selling, and disposing of marble, stone, slate, granite, and other substances, with such other incidental and necessary powers essential to carry on said business." This company, with its place of business in Cincinnati, Ohio, has acquired the entire issue of shares made by a Tennessee incorporation, engaged in a similar business and under a similar charter, and known as the "McMillin Marble Company." Its last acquisition of shares was under a contract with the defendant, who was president of the Tennessee company, and who owned, at the time of the sale, twenty-five shares, being one half of the entire stock of the company. These shares he conveyed to a trustee, selected by the purchasing corporation, for its use and benefit. The consideration for the sale was the payment of six thousand dollars, the defendant assuming and agreeing to personally pay off and discharge one half of all liability which might be fixed upon the McMillin Marble Company as a result of certain suits against that company then pending in the Courts of this State.

The bill alleges, and the evidence establishes, that the complainant company has been compelled, in order to protect the property of the McMillin Marble Company, to pay out about the sum of three thousand dollars in settlement and satisfaction of the claims in suit at time of its contract with defendant.

The relief sought is a decree against defendant for one-half this sum, being the proportion he agreed to pay under his agreement of sale.

The defense is that the contract of sale to the complainant company was unlawful and void; that is to say, that the purchase of these shares was outside the objects of its creation as defined in its charter, and is therefore such a contract as is not only voidable, but wholly void and of no legal effect; that it is not a case of excessive use of a power granted, but that no power whatever was conferred to deal in or

¹ Part of opinion omitted. — Ed.

hold the shares of another corporation; that the suit is one upon a void contract and in furtherance of it, and that it should not be entertained by a Court of law or equity.

[After discussing the question of *ultra vires* the opinion proceeds as follows:]

The result is, that this purchase of shares for the express object of controlling and managing another corporation was *ultra vires*, and, therefore, unlawful and void. Being void, it was of no legal effect, and no rights result from it enforceable by or through the Courts of the State, when such aid is invoked in furtherance of the unlawful agreement.

But it has been insisted very earnestly by the able and learned counsel for complainant, that where the contract has been fully executed by the plaintiff, the defendant should not be permitted to invoke such defense to a suit brought to compel performance; that to permit such a defense would work injustice, and enable defendant to repudiate his liability while holding on to the price he has received. There are cases where, the contract being fully executed on both sides, the Court, in the interest of justice, has refused to aid either in obtaining a rescission. *Whitney Arms Co. v. Barlow*, 63 N. Y., 62, is one of this class.

So there are cases where the defense of *ultra vires* has not been entertained when the defect was in the *mode* of executing the contract or in the *power of the agent*.

So there are many cases holding the party relying upon the defense of *ultra vires* to an accountability for the benefits received. Green's *Brice's Ultra Vires*, 717, and note at end of chapter.

Again, there are cases where the Courts have refused to entertain suits to recover property from corporations which is held in excess of charter capacity. In such cases the Courts have held that the defect in power could not be set up in a collateral way, and that the State only could complain of such violation. To this effect were our own cases of *Barrow v. Turnpike Co.*, 9 Hum., 303, and *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668.

The question here is not like any of these. The complainant sues upon its contract, and, in affirmance of it, seeks to have the defendant perform an agreement which sprang from, and was collateral to it. It has received the shares it purchased, and holds on to them. It simply asks that the defendant be further compelled to perform his contract by contributing, in accordance with his agreement, his proportion of the liability paid off by complainant in protection of the property of the McMillin Marble Company. The suit is clearly in furtherance of the original, unlawful, and void contract. That the contract has been executed by the plaintiff does not make it lawful or entitle it to an enforcement of it.

This proposition was very plainly put in *Pittsburg, etc., v. R. & H. Bridge Co.*, where it was stated, as a result of all the previous de-

cisions of that Court upon this subject, "that a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into effect, become lawful and valid; but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received." 131 U. S., 389.

The case of *Central Transportation Co. v. Pullman Car Co.* [139 U. S. 24] is an exceedingly interesting case, as it involved a consideration of the circumstances under which a defendant may interpose the defense of *ultra vires*, notwithstanding full performance by the plaintiff.

In that case, the Central Transportation Company had leased and transferred all of its property of every kind to the defendant company, which was engaged in a similar and competitive business. The lessee company undertook to pay all of the debts of the lessor company, and to pay to it annually the sum of \$264,000 for a term of ninety-nine years. Possession was taken, and the installments paid for a number of years. The suit was for a part of the installment for the last year before suit. The defense of *ultra vires* was interposed and sustained, the Court holding that the sale was unauthorized and in excess of the power of the selling company. It was urged for the plaintiff, as in this case, that, even if the contract was void, because *ultra vires* and against public policy, yet that, having been fully executed on the part of the plaintiff, and the benefits of it received by the defendant for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to an action to recover the compensation agreed on for that period.

After reviewing its own decisions upon this branch of the case, that Court said:

"The view which this Court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense — that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature — is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the Legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been com-

plied with. But where the contract is beyond the powers conferred upon it by existing law, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by law.

“A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.” 139 U. S., 60.

This seems to us to fully and clearly state the rule. The passage cited by counsel from *Railway Co. v. McCarthy*, 96 U. S., 267, “that the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice, or work a legal wrong,” is misleading; and, if literally construed, would result in an enormous practical extension of the powers of corporations.

We do not understand that a result required by adherence to the law would be either unjust or a legal wrong. The learned Judge doubtless intended it to be understood that the defense would be a legal wrong only when the law did not require its consideration by the Court.

This passage and one of similar character in *San Antonio v. Mehaffy*, 96 U. S., 312, was uncalled for in the case in which it was used, and in *Central Transportation Co. v. Pullman Car Co.*, *supra*, was characterized as “a mere passing remark.”

To sustain this suit, as now presented, would be in affirmance and furtherance of an unlawful and void contract. It is in no sense a suit in disaffirmance.

Whether complainant could tender back the shares received, and maintain a suit to recover the money paid for the shares upon an implied agreement to return money which the defendant had no right to retain, is a question not presented upon this record.

The decree dismissing the bill must, upon the grounds herein stated, be, and accordingly is, affirmed.

WALTON, J. IN BRUNSWICK, &c. CO. v. UNITED, &c. CO.

1893. 85 *Maine*, p. 541.

BUT it is claimed that, inasmuch as the defendant company took and held possession of the plaintiff company's works by virtue of the lease, *ultra vires* is no defense to an action to recover the agreed rent. We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defendant company actually occupied the works; but do not think the amount can be measured by the *ultra vires* agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent; and that while the *ultra vires* agreement may be used as evidence, in the nature of an admission, of what is a reasonable rent, it cannot be allowed to govern or control the amount. It seems to us that it would be absurd to hold that the *ultra vires* lease is void and at the same time hold that it governs the rights of the parties with respect to the amount of rent to be recovered. A void instrument governs nothing. We think the correct rule is the one stated by Mr. Justice Gray, in a recent case in the United States Supreme Court. He said that a contract made by a corporation which is unlawful and void, because beyond the scope of its corporate powers, does not by being carried into execution become lawful and valid; and that the proper remedy of the aggrieved party is to disaffirm the contract and sue to recover as on a *quantum meruit* the value of what the defendant has actually received the benefit of. *Pittsburgh, etc. v. Keokuk, etc.*, 131 U. S. 371. We think this the correct rule. 2 *Beach on Corp.* s. 423, and cases there cited.

BATH GAS LIGHT CO. v. CLAFFY.

1896. 151 *New York*, 24.1

THE plaintiff is a Maine corporation, created under a special law of that state, passed in 1853, for the purpose of supplying gas for the lighting of the streets and buildings in the city of Bath. The United Gas, Fuel and Light Company is a Maine corporation, organized in 1888, under a general law of that state.

On Nov. 10, 1888, the plaintiff company executed to the United &c. Company a lease of its property and franchises for the term of twenty-five years from November 1, 1888, at an annual rent of \$2,500, which the lessee covenanted to pay in semi-annual payments on the first day of May and the first day of November in each year, and also the taxes assessed during the term. Provision was made for the pay-

¹ Statement abridged. Arguments omitted. — ED.

ment by the lessor to the lessee, at the expiration of the term, of the value of any improvements or extensions made by the lessee, and it was also provided that the lessee should give to the lessor a satisfactory bond for the faithful performance by the lessee of its covenants in the lease. In pursuance of the provision last mentioned, the United Gas, Fuel and Light Company, on the same day, executed a bond with the defendants John Claffy and John T. Rowland as sureties, conditioned for the faithful performance by the company of the covenants in its behalf contained in the lease, which bond was delivered to and accepted by the plaintiff. The sureties were interested in the United Gas, Fuel and Light Company as stockholders, and Claffy (the appellant) was also a director. The lessee immediately, upon the execution of the lease, entered into possession of the demised property and paid the rent up to the 1st day of November, 1889, but defaulted in the semi-annual payment due May 1st, 1890, and on the 2d day of August, 1890 (the rent remaining unpaid), the plaintiff re-entered and took possession of the demised property under a provision of the lease which authorized the lessor to enter and expel the lessee on failing to pay rent. The entry also was, as may be inferred, with the consent and, indeed, at the suggestion of the officers of the lessee. This action was brought on the bond against the lessee and the sureties to recover as damages the rent which fell due May 1, 1890, and the proportionate rent from that date up to August 2d, 1890, and taxes which had been assessed against the property during its occupation by the lessee, which it had failed to pay.

The defendant Claffy alone appeared and defended the action. His sole defence to the general claim is that the lease was *ultra vires*, illegal and void, because (as is conceded) it was made without legislative sanction.

The court below gave judgment in favor of the plaintiff. Claffy appealed.

Abram J. Rose, L. Laflin Kellogg, and Alfred C. Petté, for appellant.
James McKeen, for respondent.

ANDREWS, C. J.

There are some propositions pertaining to the general subject which are beyond dispute. One is, that a contract by a corporation to do an immoral thing, or for any immoral purpose, or, to use a convenient expression, a contract *malum in se*, is void and gives no right of action. The doctrine, however, is not peculiar to contracts of corporations. It has its root in the universal principle that persons shall not stipulate for iniquity. Another principle of general recognition is that a corporation cannot enter into or bind itself by a contract which is expressly prohibited by its charter or by statute, and in the application of this principle it is immaterial that the contract, except for the prohibition, would be lawful. No one is permitted to justify an act

which the legislature within its constitutional power has declared shall not be performed. The series of cases in this state, known as the Utica insurance cases, afford an apt illustration. It was held that the restraining acts which prohibited the exercise of banking powers, including the discount of paper, by other than banking corporations, rendered void securities taken on such discount by corporations not possessing banking powers, and this, although the object of the restraining laws seems to have been the protection of the chartered banks in the monopoly of banking.

But in not infrequent instances corporations enter into unauthorized contracts, which are neither *mala in se* nor *mala prohibita*, or when the only prohibition or restriction is implied from the grant of specified powers. It is this class of cases which open the field of controversy. Is such a contract performed by one party, but not performed by the other, void as between them to all intents and purposes, so that no recovery can be had under it against the party who has received the consideration for his promise, but neglects or refuses to perform it, or is it so tainted with illegality that the courts must refuse to recognize it under any circumstances or enforce its obligation, whether as to past or future transactions? There are certain English cases which are relied upon by those who maintain the strict view that contracts of corporations *ultra vires* are under no circumstances enforceable in the courts.

It is important to observe that in each of these cases the action was brought against the offending corporation, or those in privity with it, to enforce the unauthorized contract while it was still executory on the part of the corporation, and that the effect of a recovery would have been to divert and appropriate the funds of the corporation by the action of the courts, to unauthorized objects, to the prejudice of the legal rights of stockholders and creditors. Without questioning these cases, it is quite apparent that they stand in justice upon a very different basis from the action in this case, which is brought by the corporation to enforce a contract, the enforcement of which will indemnify the plaintiff and its stockholders for the deprivation of the use of the property of the corporation, during its possession by the defendants, under the unauthorized lease. The Supreme Court of the United States seems to be committed to a construction of the doctrine of *ultra vires* which would sustain the defence in the case now before us. Several cases have arisen in that court upon leases of railroads made without legislative sanction, in which it has been held that such leases are void as between the parties, and that no action can be maintained thereon to recover the rent reserved, even during the occupation by the lessee under the lease.

We concede that a railroad or other corporation invested with powers in the exercise of which the public have an interest, and em-

powered by reason of its *quasi* public character to do acts and exercise privileges peculiar and exceptional to enable it to discharge its public duties, cannot, as against the public, abdicate its functions or absolve itself from the performance of such duties through an unauthorized transfer of its property and franchises to another body or corporation. We have so held in the case of *Abbott v. The Johnstown, etc., Railroad Co.* (80 N. Y. 27), where it was decided that a railroad corporation which, without legal sanction, had leased its road, was not thereby exempted from liability as carrier to a passenger injured by negligence during the operation of the road under the lease.

There are obvious reasons of propriety and public policy, the prevention of monopolies, among others, aside from the mere question of capacity under their charters, which enforce the now well-settled doctrine, that leases by such *quasi* public corporations, to be valid and effectual, must be authorized by statute. But where, as in the present case, such an unauthorized lease has been made, and the lessee has received and enjoyed the possession of the property under the lease, is there any public policy which requires that the lessee should be permitted to escape the obligation imposed by the contract to pay the rent reserved during the enjoyment of the property? It is doubtless true, as has been suggested, that the corporation in such cases cannot, without the consent of the state, change its obligations to the state or the public, and discharge itself from its public duties. But the law affords ample remedy for the usurpation by corporations of unauthorized powers, through proceedings by injunction or for the forfeiture of their charters. If a lease by a corporation, made in excess of its powers and without legislative sanction, is illegal in the ordinary and proper sense of the term, it may be properly conceded that no action could be maintained upon it. The lessee, when sued for the rent, could set up the illegality of the contract, and the defence would prevail, however inequitable the defence might be. But the term "illegal," which is frequently used to describe a contract made by a corporation in excess of its corporate powers, in most cases means simply that the contract is unauthorized, or one which the corporation had no legal capacity to make. Such a contract may be illegal in the true and proper sense, but it may also be one involving no moral turpitude and offending against no express statute. The inexact and misleading use of the word "illegal," as applied to contracts of corporations, *ultra vires* only, has been frequently alluded to. (COMSTOCK, C. J., *Bissell v. M. S. Railroad Co.*, 22 N. Y. 268; ARCHIBALD, J., *Riche v. Ashbury Railway Carriage Co.*, L. R. [9 Exch.] 293; LORD CAIRNS, *S. C.* on appeal, L. R. [7 Eng. & Ir. App.] 672.)

The lease now in question was not in any true sense of the word illegal. It was undoubtedly void as against the state. The parties to the lease assumed it to be valid. It was contemplated, as the provisions of the lease show, that the lessee would continue and extend the business before carried on by the plaintiff, and it is not suggested

that it did not, during its occupation, discharge all the obligations to the public which rested upon the plaintiff. The state has not intervened, and the possession of the property has now been restored to its original proprietors. The contract has been terminated as to the future, and all that remains undone is the payment by the lessee of the unpaid rent. We think the demands of public policy are fully satisfied by holding that, as to the public, the lease was void, but that, as between the parties, so long as the occupation under the lease continued, the lessee was bound to pay the rent, and that its recovery may be enforced by action on the covenant. Public policy is promoted by the discouragement of fraud and the maintenance of the obligation of contracts, and to permit a lessee of a corporation to escape the payment of rent by pleading the incapacity of the corporation to make the lease, although he has had the undisturbed enjoyment of the property, would be, we think, most inequitable and unjust. It has been suggested, to avoid the apparent injustice which would result from holding that there could be no recovery on the contract for past-due rent, that there might be a remedy on an implied contract to pay the value of the use of the property. But if the express contract was illegal in a proper sense, and the parties to the lease were guilty of a public wrong, so as to preclude a court of equity to entertain jurisdiction on the application of a lessor to be relieved from the lease and to be restored to the possession of the leased property, as was held in the case of *The St. Louis, V. & T. H. Railroad Co. v. Terre Haute & I. Railroad Co.* (145 U. S. 393), then surely it would be a mere evasion and would be inconsistent with legal principles for the court to imply a contract from the occupation under the illegal lease to relieve the wrongdoer from the dilemma into which he had voluntarily placed himself. We think the rule which should be applied is that the lessee is bound by the contract so long as he remains in possession.

It is unnecessary now to determine whether a lessee under an *ultra vires* lease may relieve himself from liability in the future by abandoning the possession and restoring, or offering to restore, it to the lessor.

[VANN, J., delivered a dissenting opinion.]

Judgment affirmed.

BARTHOLOMEW, J., IN WASHBURN MILL CO. v. BARTLETT.

1893. 3 *North Dakota*, 138, pp. 144-146.

THE statutes, too, present great variety. Some, like ours, are prohibitory in form, with no penalty attached, and silent as to the consequences of noncompliance. Others, while not prohibitory in form, attach a penalty for doing or failing to do certain specified things. Others have

both the prohibitory form and the penalty. Some declare contracts made without compliance with their provisions void and unenforceable or unlawful. Others specify various consequences that shall follow noncompliance. One class of cases, where the statutes are prohibitory, with penalty attached, holds that contracts made without compliance with the terms of the statute are nevertheless valid and enforceable, on the ground that by annexing a penalty the legislature manifested its purpose that the penalty should be exclusive of all other consequences of noncompliance. Of this class are *Lumber Co. v. Thomas*, 33 W. Va. 566, 11 S. E. Rep. 37; *Insurance Co. v. Walsh*, 18 Mo. 229; *Insurance Co. v. McMillen*, 24 Ohio St. 67; *Harris v. Runnels*, 12 How. 79. Another class of cases, under similar statutes, holds that the annexation of a penalty renders all acts which subject the party to the penalty unlawful, and hence unenforceable, on the universally accepted proposition that no cause of action can be based upon an unlawful transaction. See *Buxton v. Hamblen*, 32 Me. 448; *Miller v. Post*, 1 Allen, 434; *Wheeler v. Russell*, 17 Mass. 257; *Johnson v. Hudings*, 103 Pa. St. 498; *Holt v. Green*, 73 Pa. St. 198; *Dudley v. Collier*, (Ala.) 6 S. Rep. 304; *Insurance Co. v. Harvey*, 11 Wis. 412; *Elkins v. Parkhurst*, 17 Vt. 105. But there is still another class of cases, where the statute annexes a penalty, that holds that contracts made without compliance with the statute are nevertheless valid, on the ground that the purpose of the statute was not to prohibit business, but to accomplish some collateral object. In this class we cite *Larned v. Andrews*, 106 Mass. 435; *Aiken v. Blaisdell*, 41 Vt. 655; *DeMers v. Daniels*, 39 Minn. 158, 39 N. W. Rep. 98; *Strong v. Darling*, 9 Ohio, 201; *Pangborn v. Westlake*, 36 Iowa, 546; *Rahter v. Bank*, 92 Pa. St. 393. It has been held under statutes, prohibitory in form, but without penalty, and silent as to consequences, such as ours heretofore quoted, that all contracts entered into without compliance with the terms of the statute were absolutely void. These cases are based largely upon the thought that, inasmuch as there is no penalty or forfeiture provided in the statute for a disregard of its terms, there remains no method of its enforcement, other than to declare all contracts made in disregard of the statutory provisions unenforceable. *Bank v. Page*, 6 Or. 431; *Hacheny v. Leary*, 12 Or. 40, 7 Pac. Rep. 329; *in re Comstock*, 3 Sawy. 218; *Hoffman v. Banks*, 41 Ind. 1; *Insurance Co. v. Harrah*, 47 Ind. 236; *Insurance Co. v. Thomas*, 46 Ind. 44; *Assurance Co. v. Rosenthal*, 55 Ill. 85.

Other cases arising, like those last noticed, under statutes prohibitory in form, but without penalty or expressed consequences, have held that contracts entered into without compliance with the terms of the statute were valid, enforceable contracts as between the parties, and that one who had received and retained the benefits of such a contract could not raise the question of noncompliance. *Bank v. Matthews*, 98 U. S. 621, arose under that provision in the national banking law permitting national banks to purchase, hold, and convey real estate for cer-

tain specified purposes, and no other. The bank had received real estate security contrary to the terms of the act, and it was sought to declare such security void in the hands of the bank. The court said the prohibition was clearly implied, and as effectual as if it were expressed; but, on full consideration and a review of the authorities, it was held that the purpose of the statute was not to render such contracts void and unenforceable. The court used this language: "The intent, not the letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree that will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances, the defense of *ultra vires*, if it can be made, does not address itself favorably to the mind of the chancellor." And as a conclusion the court said: "The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by congress. That has been always the punishment prescribed for wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government." The court also quoted with approval the following language from Sedg. St. Const. 73: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or power conferred by charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity." *Whitney v. Wyman*, 101 U. S. 392, is equally instructive. It arose under a Michigan statute, which prohibited corporations from transacting business until their articles of incorporation were filed in the proper office, but attached no penalty. Certain parties purporting to act for a certain corporation, but before articles of incorporation were filed, ordered certain machinery of plaintiff, which was forwarded and charged to the parties ordering, and not to the corporation. The parties refused to pay, and plaintiff brought action against them, claiming that the corporation for which they purported to act could not transact business by reason of the statutory restriction. A unanimous court, speaking by Justice Swayne, said: "The restriction imposed by the statute is a simple inhibition. It did not declare what was done should be void, nor was any penalty prescribed. No one but the state could object. The contract is valid as to plaintiff, and he has no right to raise the question of its invalidity;" citing the case of *Bank v. Matthews*, and showing that the court considered the principle involved to be the same.

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SECTION VIII.

Suit against Corporation on an Ultra Vires Contract which has been fully performed on the Plaintiff's Part.

BISSELL v. THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD COMPANIES.

1860. 22 *New York*, 258.¹

APPEAL from the Supreme Court. Action against two distinct railroad corporations for a breach of their duty, safely to convey the plaintiff, a passenger upon a train of cars, which they, by a contract between them, had united in running, and by means of the negligence of their agents suffering a collision with another train, by which the plaintiff's leg was broken. The trial was before referees, who found these facts :

The Michigan Southern Railroad Company was chartered by the State of Michigan to build and operate a railroad through the southern part of Michigan ; and the Northern Indiana Railroad Company was chartered by the State of Indiana to build and operate a railroad through the northern part of the State of Indiana. The Southern Michigan Railroad Company built the road through the State of Michigan, and the Northern Indiana Railroad Company built the road through the State of Indiana ; and also, in conjunction with another railroad company, they built the railroad from the northern part of the State of Indiana, through a part of the State of Illinois, to the city of Chicago. Previous to the 25th day of April, 1853, the Southern Michigan Railroad Company and the Northern Indiana Railroad Company formed a business connection, under the name of the Michigan Southern and Northern Indiana Railroad Companies, and on or about the 25th day of April, 1853, ran their cars carrying passengers and freight from Lake Erie to Chicago and the intermediate places, and from Chicago to Lake Erie and the intermediate places, through the States of Ohio, Michigan, Indiana and Illinois. The cars and other property connected with these roads were used by the Michigan South-

¹ Portions of the opinion of SELDEN, J., are omitted. — ED.

ern and Northern Indiana Railroad Companies jointly, and each shared in the profits and losses. The business of the companies was carried on and transacted under their joint name, and the companies were practically consolidated into one. The defendants, on the 25th day of April, 1853, and at the time this action was brought, had, in the city of New York, in this State, a general office of business, occupied by their president and treasurer, where a large portion of their moneys, funds and other property was kept. On the 25th day of April, 1853, while the defendants were jointly operating these roads, from Chicago to Lake Erie, through the States of Illinois, Indiana, Michigan and Ohio, to Lake Erie, the defendants took into a train of their cars near Chicago, in the State of Illinois, the plaintiff and his baggage, as a passenger therein, to Toledo, for fare and reward. While the plaintiff was on the defendants' cars, and while being conveyed by them eastward on said road, in the State of Illinois, the defendants' cars were run carelessly, at a hazardous speed at the crossing of the Illinois Central Railroad, and the road occupied and run by the defendants; by means whereof the defendants' cars run into and came in collision with a train of cars then running on the Illinois Central Railroad, across the said road owned and occupied by the defendants, and a passenger car of the defendants', which the plaintiff occupied, was broken to pieces, and the plaintiff damaged and injured in his person and property.

The referees reported in the plaintiff's favor for \$2,500, for which judgment was entered; and such judgment having been affirmed at general term in the sixth district, the defendants appealed to this court.

Charles Tracy, for the appellants.

Amasa J. Parker, for the respondent.

COMSTOCK, Ch. J. A general statement of the plaintiff's case is, that the two corporations defendant were jointly engaged in the business of carrying passengers and freight between Chicago and Lake Erie, through a part of the State of Illinois, and through the States of Indiana and Michigan, by three connected railroads which they owned or controlled, and the business of which was managed under a consolidated arrangement which had been in force between the defendants for some time previous to the injury complained of; that, being so engaged, they undertook and assumed to carry him, the plaintiff, as a passenger from Chicago, or a point near that place, eastward over the consolidated line of road; that he took his seat in their cars accordingly, and that during the transit he was injured by an accident which happened through their carelessness and neglect. Assuming the truth of this statement, there is no doubt of the plaintiff's right to recover. But the defendants deny the legal truth of these facts, because one of the companies was chartered by the legislature of Michigan, with power to build a road in that State, and the other by the legislature of Indiana, with power to build one in that State. They both insist that they had no right or power under their respective charters to consolidate their

business in the manner stated, and especially that they could not legally, either separately or jointly, acquire the possession and use of a connecting road in the State of Illinois and undertake to carry passengers or freight over the same. They do not deny that their boards of directors and agents, duly authorized to wield all the powers which the corporations themselves possessed, entered into the arrangements which have been mentioned, nor that, in the execution of those arrangements, they made the contract with the plaintiff to carry him as a passenger; nor do they deny that they received the benefit of that contract in the customary fare which he paid. Their defence is, simply and purely, that they transcended their own powers and violated their own organic laws. On this ground they insist that their business was not, in judgment of law, consolidated; that they did not use and operate a road in Illinois; that they did not undertake to carry the plaintiff over it; and did not, by their negligence, cause the injury of which he complains; but that all these acts and proceedings were, in legal contemplation, the acts and proceedings of the natural persons who were actually engaged in promoting the same.

Can then two railroad corporations, having connecting lines, thus unite their business, for the purpose of promoting their common interest: charter another connecting road in furtherance of the same policy: hold themselves out to the public as carriers over the whole route: enter into contracts accordingly: receive the benefit of those contracts; and then, when liabilities arise, interpose the violation of their own charters to shield them from responsibility? Such a defence is shocking to the moral sense, and although it appears to have some support in judicial opinions, I think it has no foundation in the law.

The doctrine has certainly been asserted on some occasions, that, in all cases where the contracts and dealings of a corporation are claimed to be invalid for want of power to enter into the same, a comparison must be instituted between those contracts and dealings and the charter, and, if the charter does not appear to embrace them, then that they must be adjudged void to all intents and purposes, and in all conceivable circumstances. The reasoning on which this doctrine has been usually claimed to rest, denies, in effect, that corporations can, or ever do, exceed their powers. They are said to be artificial beings, having certain faculties given to them by law, which faculties are limited to the precise purposes and objects of their creation, and can no more be exerted outside of those purposes and objects than the faculties of a natural person can be exerted in the performance of acts which are not within human power. In this view, these artificial existences are cast in so perfect a mould that transgression and wrong become impossible. The acts and dealings of a corporation, done and transacted in its name and behalf by its board of directors, vested with all its powers, are, unless justified by its charter, according to this reasoning, the acts and dealings of the individuals engaged in them, and for which they alone are responsible. But such, I apprehend, is not the nature of

these bodies. Like natural persons, they can overleap the legal and moral restraints imposed upon them: in other words, they are capable of doing wrong. To say that a corporation has no right to do unauthorized acts, is only to put forth a very plain truism; but to say that such bodies have no power or capacity to err, is to impute to them an excellence which does not belong to any created existences with which we are acquainted. The distinction between power and right is no more to be lost sight of in respect to artificial than in respect to natural persons.

I think this doctrine of theoretical perfection in corporations would convert them practically into most mischievous monsters. A banking institution, through its board of directors, may invest its funds in the purchase of stocks or cotton, and every holder of its stock may acquiesce, expecting to profit by the speculation. If the enterprise is successful, the corporation and its stockholders gain by the result. If a depression occurs in the market, and disaster is threatened, the doctrine that a corporation can never act outside of its charter enables it to say, "this is not our dealing," and the money used in the adventure may be unconditionally reclaimed from whatever parties have received it in exchange for value; while the injured dealer must seek his remedy against agents perhaps irresponsible or unknown. Corporations may thus take all the chances of gain, without incurring the hazards of loss. Familiar maxims of the law must be reversed. In the relation of private principal and agent, the adoption of an agent's unauthorized dealing is equivalent to an original authority; and the adoption is perfect when the principal receives the proceeds of that dealing. Corporations may practically act in the same manner. The proceeds of unauthorized adventures may be received and become blended with their legitimate business and funds so as to be wholly undistinguishable; but, as the adventures themselves were, in judgment of law, impossible, considered as corporate transactions, so they cannot become possible upon any principle of ratification or estoppel. If we say there is an utter absence of power or faculty to engage in the dealing, it is a self-evident proposition that no rule of estoppel can change the result.

It is not uncommon, in charters of corporations, to lay express prohibitions upon them as a limitation of their powers, having in view the maintenance of some public policy; as, for example, prohibitions relating to the currency of the State. If they violate these prohibitions, they have been supposed to be public offenders, and on that ground the law has always denied to them its remedial processes either in affirmance or disaffirmance of their unlawful contracts; thus regarding them as private offenders are regarded. But this rule of law must be overthrown, if we admit this theory of constitutional inability in corporations to overstep the limits of rightful power. In the case of *The Life and Fire Insurance Company v. The Mechanics' Fire Insurance Company* (7 Wend., 31), it was contended that a certain corporate transaction, if unlawful, was to be regarded as the act of the

agents or officers of the company, and not of the company, and, therefore, that the company should be allowed to recover back the money or property improperly disposed of. That doctrine was refuted by Mr. Justice SUTHERLAND in this language: "This would be a most convenient distinction for corporations to establish—that every violation of their charter or assumption of unauthorized power on the part of their officers, although with the full approbation of their directors, is to be considered the act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers and thereby forfeiting its charter, or incurring any other penalty, if this principle could be established." These remarks suggest an unanswerable argument against the doctrine. Why, it may be asked, does the law provide the remedy by *quo warranto* against corporations for usurpation and abuse of power? Is it not the very foundation of that proceeding, that corporations can and do perform acts and usurp franchises beyond the rightful authority conferred by their charters? Most assuredly this is so. The sovereign power of the State interposes, alleges the excess or abuse, and on that ground demands from the courts a sentence of forfeiture.

One of the sources of error in reasoning upon legal as well as other questions, is, inexactness in the use of language, or, perhaps, in the perfectness of language, to express the varieties of thought. It is a self-evident truth, that a natural person cannot exceed the powers which belong to his nature. In this proposition, we use words in their literal and exact sense. In the same sense, it is a truth equally evident that a corporation cannot exceed its powers; but this is only asserting that it cannot exercise attributes which it does not possess. As an impersonal being, it cannot experience religious emotion, or feel the moral sentiments. Corporations are said to be clothed with certain powers enumerated in their charters or incidental to those which are enumerated, and it is also said they cannot exceed those powers; therefore, it has been urged that all attempts to do so are simply nugatory. The premises are correct when properly understood; but the conclusion is false, because the premises are misinterpreted. When we speak of the powers of a corporation, the term only expresses the privileges and franchises which are bestowed in the charter; and when we say it cannot exercise other powers, the just meaning of the language is, that as the attempt to do so is without authority of law, the performance of unauthorized acts is a usurpation which may be a wrong to the State, or, perhaps, to the shareholders. But the usurpation is possible. In the same sense, natural persons are under the restraints of law, but they may transgress the law, and when they do so they are responsible for their acts. From this consequence corporations are not, in my judgment, wholly exempt. The privileges and franchises granted are not the whole of a corporation. Every trading corporation aggregate includes an association of persons having a collective will, and a board of directors or other agency in which that will is embodied, and through

which it may be exerted in modes of action not expressed in the organic law. Thus, like moral and sentient beings, they may and do act in opposition to the intention of their creator, and they ought to be accountable for such acts.

A great variety of cases might be supposed, in which this doctrine of corporate exemption from liability could not be defended upon any rule of reason or principle of justice. But perhaps none of them would afford a more persuasive illustration than the one now under consideration. Let us look at the facts and consider the results. These corporations had boards of directors in whom were vested every power, faculty or function which belonged to the bodies they represented. We have then no question in the law of agency; for the agents, if that be the proper term, had all the powers of the principals. Indeed, in an important sense, they were the principals; because their authority was not received by delegation from any other principal. These boards proceeded to consolidate the two lines of road, and they included in the scheme another connecting road. This being done, they entered into all the relations of carriers with the public, and the entire business of both companies was thus conducted for a period of several years, with no complaint on the part of the State sovereignties which granted the charters, and none on the part of the shareholders. All the gains and profits of the business were received to the use of the corporations, and it is to be assumed that the shareholders were benefited thereby. The question arises, where were these companies and what were they doing during all this period? The question would be the same if that mode of conduct were to continue without limit of time. If the acts mentioned were in excess of the powers granted, and if we concede the doctrine that such acts are in all circumstances to be imputed to the agents who perform them, the conclusion follows, that the corporations became virtually extinct by a non-user of their franchises. If the business thus conducted was not the business of the companies, they were engaged in none whatever, and thus, practically, if not legally, ceased to exist. If it was the business of the directors as natural persons, then those persons must be deemed not only to have taken a wrongful possession of all the estate and funds of the corporations they professed to represent, but also to have usurped their franchises, and to have stolen their corporate names and seals. If this be the legal interpretation of the course of dealing and conduct actually carried on under the acts of incorporation passed by the legislatures of Michigan and Indiana, then the companies might have been proceeded against by those States, not on the ground of a usurpation of powers and privileges which did not belong to them, but for a total non-user of the franchises which did belong to them; while, on the other hand, writs of *quo warranto* might have been issued against the individual directors and agents for usurping corporate rights without any charter at all. (16 Wend., 655; 23 id., 193; 3 Bl. Com., 263.) These conclusions are not founded in any known principle or practice, and they are totally opposed to the facts

of the case. In rejecting them, we must also reject the theory of corporate perfection and immunities on which they were based; and we are compelled to hold that those companies, as legal and accountable persons, engaged themselves in the business of carrying passengers and freight under and according to the arrangements which have been mentioned, and thereby placed themselves in that relation to the public, and to the plaintiff in particular, which is the subject of the present controversy.

But the doctrine, that corporations can never be bound by engagements not justified by the grant of power from the State, is next defended on a different ground. Although it be conceded that they are present, and acting as legal persons, or entities, when such engagements are entered into, it is said that all contracts in excess of the rightful power possessed by corporations are illegal and therefore void. This is an argument totally different from the one which has been so far examined, because it necessarily imputes the making of the contract to the corporate person or being; whereas, the doctrine which I have endeavored to refute denies that proposition. The very point of the supposed illegality consists, or at least it may consist, in the performance of acts perfectly lawful in themselves, but which, being done by a corporation, and not by individuals, are pronounced illegal because they are so done without authority contained in the charter.

But is it true that all contracts of corporations for purposes not embraced in their charters are illegal, in the appropriate sense of that term? This proposition I must deny. Undoubtedly such engagements may have the vices which sometimes infect the contracts of individuals. They may involve a *malum in se* or a *malum prohibitum*, and may be void for any cause which would avoid the contract of a natural person. But where no such vices exist, and the only defect is one of power, the contract cannot be void because it is illegal or immoral. Such a doctrine may have some slight foundation in the earlier English railway cases (*The East Anglian Railway Co. v. The Eastern Counties Railway Co.*, 7 Eng. Law and Eq., 509; *McGregor v. The Deal and Dover Railway Co.*, 16 id., 180); but it was never established, and is not now received in the English courts. (*The Mayor of Norwich v. The Norfolk Railway Co.*, 30 Eng. Law and Eq., 120; *Eastern Counties Railway Co. v. Hawkes*, 35 id., 8, 37.) The books are full of cases upon the powers of corporations and the effect of dealing in a manner and for objects not intended in their charters; but with the slight exception named, there is an entire absence, not only of adjudged cases, but of even judicial opinion or dicta, for the proposition that mere want of authority renders a contract illegal. Such a proposition seems to me absurd. The words *ultra vires* and illegality represent totally different and distinct ideas. It is true that a contract may have both those defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription, made by authority

of the board of directors and under the corporate seal, for the building of a church or college or an almshouse, would be clearly *ultra vires*, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it would still be *ultra vires*, but no wrong would be committed and no public interest violated. So a manufacturing corporation may purchase ground for a school house or a place of worship for the intellectual, religious and moral improvement of its operatives. It may buy tracts and books of instruction for distribution amongst them. Such dealings are outside of the charter; but, so far from being illegal or wrong, they are in themselves benevolent and praiseworthy. So a church corporation may deal in exchange. This, although *ultra vires*, is not illegal, because dealing in exchange is, in itself, a lawful business, and there is no State policy in restraint of that business.

To illustrate the subject in another manner: An agent may make a contract in the name and behalf of his principal, but not within the scope of his agency. If the consideration and purpose of such a contract be lawful, it may be void as against the principal, but not on the ground of illegality. A corporation is not an agent of the State, or, in any strict sense, of the shareholders. But it derives its powers from the State, and it may transcend those powers for purposes which, in themselves considered, involve no public wrong. Contracts so made may be defective in point of authority, and may contemplate a private wrong to the shareholders; but they are not illegal, because they violate no public interest or policy. My meaning, in short, is that the *illegality* of an act is determined in its quality and does not depend on the person or being which performs it.

There has been, I think, some want of reflection, even in judicial minds, upon the reasons and policy which mainly govern in the granting of charters to corporations, with certain specified powers and no others. A private or trading corporation is essentially a chartered partnership, with or without immunity from personal liability beyond the capital invested, and with certain other convenient attributes which ordinary partnerships do not enjoy. It is also something more than a partnership, because the legal or artificial person becomes vested with the title to all the estate and capital contributed, to be held and used, however, in trust for the shareholders. Now, in a well regulated unincorporated partnership, the articles entered into by the associates specify the objects of their association. But, suppose the same associates desire a charter of incorporation for the more convenient prosecution of the same business, and obtain one. We shall find it to contain the like specification, which becomes the grant of power from the sovereign authority of the State. I am speaking of powers and privileges granted which are not, in their essential nature, corporate or public franchises, as distinguished from the private enterprises which any class of citizens may embark in; and, with the exception of municipal or governmental charters, the class of powers here referred to will be found to cover

nearly the whole field of corporate rights. It is not difficult, then, to see the reason and policy which underlie such grants. The associates ask for a charter in order to carry on their business with greater advantages; and the same reason exists for a specification of the purposes of their organization as in the case of an association without a charter. The charter takes the place of the articles of agreement, and becomes the appropriate rule of action. No public interest or policy is involved, because the objects of the grant are not of a public nature. The powers and rights specified are identical with those which any private person or association of persons may exercise. If those who manage the concerns of a simple partnership deal with the funds in a manner or for purposes not specified, their acts are *ultra vires*; and if the directors of such a corporation, as I am here speaking of, do the same thing, their acts are also *ultra vires* in the same sense and no other. To apply the word "illegality" to such transactions, is to confound things of a totally different nature. It is only private interests which are affected by them; and there is no statute or rule of the common law by which they become public offences.

In every treatise upon the law of contracts — and there are many of them — we shall find an enumeration of such as are immoral or illegal; but amongst them cannot be found a specification of the promise or agreement of a corporation, founded on a lawful consideration, and to do that which in itself is lawful to be done, although not within the powers granted. It has always been supposed, and to that effect are all the authorities, that contracts are illegal either in respect to the consideration or the promise. Where both of these are lawful and right, the maxim, "*ex turpi contractu non oritur actio*," can have no application. The incapacity of the contracting party, whether it be a corporation, an infant, a *feme covert*, or a lunatic, has nothing to do with the legality of the contract, in that sense of the word which is now under discussion. So, in the treatises upon corporations, we shall find their rights and privileges to be very extensively considered, but nowhere an intimation that their dealings outside of their charters are deemed illegal for that cause. Even the proceeding against them by *quo warranto*, for the exercise of ungranted powers, will illustrate the subject. This is a civil, and not a criminal proceeding, and its object is purely and solely to try a civil right. (2 Kyd on Corporations, 439; Angel & Ames, 686; 1 Serg. & Rawle, 385; 3 Dallas, 490; 1 Blackf., 267.) Our statute on this subject makes it the duty of the Attorney-General to institute the proceeding, under leave of the court, when the case is one of public interest, but, in other cases, only at the instance of private parties claiming to be aggrieved by the abuse of power, and on security being given to indemnify the State. (2 R. S., 583, §§ 39, 40.) In any case, whether the suit be founded on the alleged usurpation of a public or corporate office, or on the non-user or misuser of the franchises granted to a corporation, it is purely a civil right which is tried, and the judgment is not penal, but simply one of ouster from the

right claimed. The legislature may, and sometimes does, expressly prohibit the doing of certain acts by corporations, having in view the promotion of some particular policy of the State, and may declare such acts to be public offences, to be punished by fine or imprisonment of the parties engaged in them. There are such laws in regard to incorporated as well as private banks, the object of which is to protect the currency of the State. But where there are no such penalties or prohibitions, and the dealings of a corporation have no relation to State policy, but are such as all mankind may freely engage in, the law has provided no punishment for such dealings, because it does not regard them as a violation of its principles and enactments in any sense which is material to the present inquiry. I do not deny that there is, in a different sense, a legal wrong in the misapplication of the corporate capital and funds; and so there is in every breach of trust or violation of contract. But the true inquiry here is, whether it belongs to the class of public, as distinguished from private wrongs, so that the guilty party may set it up in avoidance of just obligations; and whether the courts must, in all circumstances, accept that defence without regard to the situation and rights of the other party. I cannot believe such to be the rule of reason or of law.

Let us now concede that the unauthorized contracts of a corporation are illegal in the sense contended for. It by no means follows that they are never to be enforced. An agreement declared by statute to be void cannot be enforced, because such is the legislative will. But when, without any such declaration, it is simply illegal, it is capable of enforcement where justice plainly requires it. Circumstances may and often do exist, which estop the offender from taking advantage of his own wrong. The contract may be entered into on the other side without any participation in the guilt, and without any knowledge even of the vice which contaminates it. An innocent person may part with value, or otherwise change his situation, upon the faith of the contract. A railroad corporation, for example, may purchase iron rails and give its obligation to pay for them with a design to sell them again on speculation, instead of using them for continuing its track. Such a transaction is clearly unauthorized, and is, therefore, said to be illegal. But if the corporation is deemed to make the contract — in other words, if, as I have above shown, it is a legal possibility for corporations to make contracts outside of their just powers, how can its illegality be set up against the other party who knows nothing of the unlawful purpose? So an incorporated bank may purchase land, having power to do so for a banking house, but actually intending to speculate in the transaction. This is also *ultra vires*, but can the want of authority be interposed in repudiation of a just obligation to pay for the same land, the vendor not being *in pari delicto*? Such a doctrine is not only shocking to the reason and conscience of mankind, but it goes far beyond the law in regard to the illegal contracts of private individuals.

As I am not contending that the unauthorized dealings of a corpora-

tion are never to be questioned, the object of this discussion has been to ascertain the true ground on which they can be impeached where they are not attended by the vices which are fatal to private contracts also. I have shown, I trust, 1. That such dealings are possible in law, as they often take place in fact: in other words, that it is in the nature of these bodies to overleap the restraints imposed upon them. 2. That a transgression of this nature is a simple excess of power (using that word to express the rules of action prescribed in their charters, and by which they ought to regulate their conduct), but is not tainted with illegality so as to avoid the contract, or dealing, on that ground. This proposition, it seems hardly necessary to repeat, is applied only to transactions which involve or contemplate no violation of the code of public or criminal law, but, on the contrary, are innocent and lawful in themselves. 3. Even illegal contracts, in the proper sense, are not, universally and indiscriminately, to be adjudged void; and, especially, this is not so where the offender alleges his own wrong to avoid just responsibility, the other party being innocent of the offence.

If these negative conclusions cannot be denied, it follows that contracts and dealings, such as I have been speaking of, are to be condemned by the courts only on the ground that they are a breach of the duty which private corporations owe to the stockholders to whom the capital beneficially belongs. It is the undoubted right of stockholders to complain of any diversion of the corporate funds to purposes unauthorized in the charter. This, as a general principle, cannot be too strongly asserted; and by this principle, justly applied to particular instances, the question in such cases is to be resolved. The original subscribers contribute the capital invested, and they and those who succeed to their shares are always, in equity, the owners of that capital. But, legally, the ownership is vested in the corporate body, impressed with the trusts and duties prescribed in the charter. In these relations we have the only true foundation of the plea of *ultra vires*. That term is of very modern invention, and I do not think it well chosen to express the only principle which it can be allowed to represent in cases of this nature. It is not to be understood as an absolute and peremptory defence in all cases of excess of power, without regard to other circumstances and considerations. It is not to be looked upon as a plea which denies the actual exertion of corporate power when a corporation enters into an engagement which, according to its charter, it ought not to make; but, because such was the nature of the contract, it presents the breach of trust or duty to the shareholders as an excuse for the non-performance. And I do not deny the validity of this excuse in many cases, I may say in all cases where it can be received without doing greater injustice to others. If the person dealing with a corporation knows of the wrong done or contemplated, and he cannot show the acquiescence of the shareholders, he ought not to complain if he cannot enforce the contract. Aside from the law of corporations, agreements which involve or propose a violation of trust will not be

enforced by the courts where no greater equities demand it. Corporate bodies are more than mere agents. They are more than a partner who manages as the agent of his associates. Their powers are undelegated. They are the legal owners of the capital, or estate, and they have capacity to deal with it in contravention of duty or trust.

But the equitable rights of shareholders will enable them, in many circumstances, to claim the affirmative interposition of the courts to arrest an unauthorized course of dealing, or to prevent a threatened diversion of the capital to improper uses. Of this character are many of the cases usually cited, to prove that corporations cannot exceed their powers. (*Dodge v. Woolsey*, 18 How. U. S., 331; *Rolf v. Rogers*, 3 Paige, 154; *Angel & Ames on Corp.*, 424, 4th ed., and cases cited.) So, too, it is plain, without citing authority, that a stockholder, who can show that he has sustained a pecuniary loss by such a use of the capital, may have his redress in damages against the individuals who commit the wrong, unless he has himself acquiesced. These are extensive, and, it would seem, ample remedies to prevent or redress the abuse of power; and it appears to me a much higher and better policy, that the private shareholders should be confined to these remedies, than to sacrifice the interests of the rest of community by conceding to these bodies absolute immunity whenever power is thus abused. But the principles which belong to this question need not present that naked alternative. In many cases no injustice will be done by receiving the plea of *ultra vires*, when defensively interposed by the corporation itself. But these are cases where a want of good faith can be imputed to the dealer, and where the defence, if allowed, will leave the parties substantially in the enjoyment of their previous rights. An artificial, not less than a natural person, having the title and possession of an estate which, in equity, belongs to others, and entering into engagements inconsistent with duty or trust, should have a *locus penitentie*, where it can be allowed without manifest wrong to others. It may be difficult to lay down a rule so general and so exact as to include every case; but the principles and analogies of the law will be sufficient for the solution of such questions as they arise. Justice, not only in this, but in very many other cases of constant occurrence, can be administered according to law, if I have succeeded in showing, negatively, that a comparison of the charter of a corporation with what it actually does is not always the test of liability.

It is said that there will be no restraint upon the acts and dealings of corporate bodies, if we uphold them when in excess of rightful authority. To this I answer, that the most ample restraints will be found in the principles here advocated; while, on the other hand, if we concede to corporations immunity in all cases when they do wrong, we invite and reward the very abuse. It is also said, in order to render this doctrine less offensive to the reason and conscience, that the innocent dealer may, upon the voidness of the contract and a disaffirmance of it, recover back the value or consideration with which he has parted. This position

necessarily concedes that the corporation, as a legal person, made the unauthorized contract, and received the money, or value, under and according to it; thus overthrowing the main objection to its liability to respond directly upon the contract. It also concedes the innocence of the other contracting party; thus, according to all the analogies of the law, refuting the only other objection (illegality) on which the absolute invalidity of such dealings is claimed to rest: for, surely, after conceding that the corporation actually made the contract, it will not be contended that it can set up that it ought not to have made it, against an innocent person who has given up his money or property on the faith of the same contract. But I answer, further, that while in many cases the remedy of a suit in disaffirmance of the agreement, and to recover back the consideration, will be sufficient to prevent wrong, in many others it will be entirely worthless. All collateral securities must fall to the ground with the principal contract, and all its consequences and results. The present case will afford the best illustration. The defendants, in consideration of a trifling sum received from the plaintiff for fare, agreed to perform the service of carrying him in their cars, perhaps some two hundred miles. By the negligent performance of that agreement, they inflicted on him injuries for which a jury has said the proper compensation was \$2,500. This being the measure of damages for the breach of the contract, the absurdity, not less than the injustice, of confining him to the remedy of disaffirmance because the agreement was *ultra vires*, must be quite apparent.

I have examined these questions with the more attention, because, aside from their bearing on the present controversy, they are of great practical importance. A vast amount of the business of the community has come to be carried on under corporate forms of organization. Besides innumerable special charters, we have general laws which impart corporate attributes to associations formed according to articles of agreement, for a great variety of purposes. When we consider these to be any less than partnerships, with the superadded privileges of succession, of a corporate seal, &c., we forget that corporations are no longer confined to the exercise of public or political franchises. These commercial, manufacturing, and trading bodies are brought into relation with almost every member of the community; and I think it greatly to be desired that, in laying down the rules of law which are to govern in such relations, we should avoid a system of destructive technicalities. Those rules should be founded in the principles of justice which are recognized in other and analogous dealings among men.

If we could find the law to be settled in the manner which must be and is contended for in order to exonerate the defendants in this case from responsibility, it would be our duty to follow it. But such is not the case. There are, certainly, judicial opinions, and some adjudged cases, which countenance the extreme doctrines on which the defence must rest. Among these cases, a leading one is that of *Hood v. The New York and New Haven Railroad Company* (22 Conn., 502).

That case appears to go the length of holding that corporations cannot and never do perform acts in excess of their powers. No authority was cited for such a proposition, and it cannot, as I think I have shown, be maintained. Another extreme authority is, *Pearce v. The Madison and Indianapolis Railroad Company* (21 How. U. S., 442), where it appeared that a corporation, in furtherance of its general objects, although, strictly speaking, in excess of its powers, had entered into an engagement upon a consideration which it had received and appropriated. It was allowed to repudiate that engagement; but the principles of the question were not much discussed. A considerable number of other cases and *dicta*, of a character less marked, but tending in the same direction, might be referred to. But, on the other hand, there are well-considered authorities which sustain the principles advocated in this opinion. (*The Steam Navigation Co. v. Weed*, 17 Barb., 378; *The Silver Lake Bank v. North*, 4 Johns. Ch., 370; *The Chester Glass Co. v. Dewey*, 16 Mass., 94, 102; *The Bank of Genesee v. The Patchin Bank*, 3 Kern., 309, 314; *Bulkley v. Derby Fishing Co.*, 2 Conn., 252, 255; *Parker v. The Boston and Maine R. R.*, 3 Cush., 107, 108; *Alleghany City v. McClurkan et al.*, 14 Penn., 83; 29 Verm., 93.) In the case from 2d Connecticut, it was said: "A corporate body, by transgressing the limits of its charter, may doubtless incur a forfeiture of its privileges and powers; but who ever imagined that it could thus acquire immunity to the prejudice of third persons?" It will be found, indeed, that such a doctrine is of very modern origin. In the case from 14th Pennsylvania, COULTER, J., observed: "It is not universally true that a corporation cannot bind the corporators beyond what is expressly authorized in the charter. There is a power to contract, undoubtedly; and if a series of contracts have been made, openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted. A bank, which has been long in the habit of doing business of a particular description, would not be exonerated from liability because such business was not expressly authorized in its charter. The object of all law is to promote justice and honest dealing, when that can be done without violating principle. I cannot perceive that any principle is violated by holding a corporation liable for the acts of its accredited agents, even not expressly authorized, when these contracts for a series of times were entered into publicly and in such a manner as, by necessary and irresistible implication, to be within the knowledge of the corporators." "One rule of law," he adds, "is often met and counterchecked by another of equal force, so that, although the corporators are, in general, protected from unauthorized acts of their agents, yet, at the same time, a rule of equal force requires that they should not deceive the public or lead them to trust and confide in the unauthorized acts of their agents. If they receive the avails and value of those acts, it is implicit evidence that they consented to and authorized them." A more particular discussion of the authorities on either

side, would not be profitable. The general question is one which ought to be considered on principle; and I have so viewed it, because I find no settled rule which stands in the way of such an examination.

But little more need be said in reference to the particular case now before us. If the defendants did not become liable for the breach of their undertaking to carry the plaintiff, or of their duty resulting from that undertaking, I can see no ground for holding them accountable as simple wrongdoers. If their contract was *ultra vires*, and that defence to an action upon it must be received as absolute and peremptory—if no principle of estoppel or rule of justice can be urged against that defence—then it is more clear that the simple wrong to the plaintiff's person was also *ultra vires*. It was with considerable difficulty that the liability of a corporation in any case for a pure tort was ever established; and they are never so liable except when engaged in the performance of some duty or undertaking in respect to which accountability arises. If the defendants' express undertaking was absolutely void, so that no duty could arise thereupon, the implied undertaking resulting from the actual attempt to carry the plaintiff as a passenger is encountered by the same objection; and there is nothing left of the transaction except a pure and simple tort, committed by the defendants' servants while not engaged in any business which could bring responsibilities upon the defendants themselves. I think it plain that this theory of liability will not sustain the plaintiff's case.

But I have no hesitation in affirming the judgment of the court below, upon the principles of contract and of duty resulting therefrom. That the entire course of business in which the defendants were engaged could not be justified by their charters, I am not prepared to deny. Each of them was chartered to build a railroad, the termini of which were specified. They built the roads, and then consolidated their business. The common interest might thus be promoted; but it is difficult to affirm that the charter of either authorized its capital to be thus blended with that of the other. It is equally difficult to hold that they had any rightful authority to construct or lease another road in continuation of the line. But these things were actually done, and they were done openly and publicly. If these acts were an abuse of power, the shareholders had ample opportunity to prevent or arrest the abuse. But no complaint from them has ever been heard, and their acquiescence must be presumed. If State sovereignties were wronged by the course of dealing pursued, no interference or complaint has come from that quarter. Conceding, then, that the defendants might change the attitude in which they stood toward the public, and return at any time to the sphere of legitimate duty, they could not revoke past contracts, the consideration of which they had received, and upon the performance of which they had entered. They were bound to pay their servants and laborers, and they were liable for the careful transportation of freight committed to their charge. They could not invite a traveler into their cars, and, after injuring him by their negligence, reject the

responsibilities of their contract. A traveler from New York to the Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations. The present case, in short, plainly falls within the principles of corporate liability herein asserted, and the defendants must respond to that liability. The judgment should be affirmed.

SELDEN, J. It was not strenuously insisted upon the argument that the acts of these two railroad companies in entering into the arrangement found by the referee, and in running their cars upon joint account through the States of Ohio, Indiana and Illinois, were authorized by law; nor have I been able to find in the statutes of those States any sufficient warrant for these acts. I shall assume, therefore, that in undertaking to carry the plaintiff from Chicago, in the State of Illinois, to Toledo, in the State of Ohio, the defendants exceeded their corporate powers; and, as the allegation in the complaint, of carelessness and negligence on the part of the defendants, or their agents, is fully sustained by the finding of the referee, the defence must rest exclusively upon this want of power. The counsel on both sides have treated the action as founded upon contract, and in that aspect of the case the question arises whether want of authority on the part of a corporation, to enter into any engagement, is a valid defence to such corporation when sued for its violation.

This question has not until lately attracted much attention. But the recent rapid multiplication of these artificial bodies, and the extensive powers and privileges conferred upon them, have made it a question of importance. It has, within a few years past, been repeatedly presented to the courts, both in this country and in England, and with one unvarying result. I cannot, myself, regard it, therefore, as in any just sense open to discussion. If questions, which have been over and over again considered, and over and over again decided, are to be treated as still unsettled, then are we without any stable foundation of law or justice. The evils attendant upon setting legal principles afloat upon a sea of uncertainty and doubt, and causing them to depend upon the fluctuations of individual opinion are too obvious to need enumeration. Confidence in courts is only to be retained by their exhibiting stability in their own decisions, and a becoming respect for those of other tribunals. It has been so often and so uniformly decided that corporations are not bound by contracts which are clearly *ultra vires*, that to hold the contrary now would take the legal profession by surprise, and introduce more or less confusion into this important branch of the law.

But, while I protest against considering this as an open question, and insist that it should be treated as settled by authority, I also maintain that the numerous decisions on the subject by both the English and the American courts, rest upon a solid foundation of reason and principle. Much of the apparent force of the arguments used to prove the contrary, is produced by substituting entirely false basis for those decisions. If they really rested, as has been sometimes

supposed, upon the ground that because corporations are artificial beings, having no natural powers, but only such as are conferred upon them by law, they cannot by possibility do any act beyond the limits prescribed by their charters; and hence that no such act, although done by their agents, in their name, and for their benefit, can be considered as a corporate act, but must in all cases be treated as the personal act of such agent, it would, indeed, be easy to show their fallacy. This would be, as is justly said, to attribute to them a degree of perfection that belongs to no earthly existence, whether natural or artificial. To present this as the true foundation of the rule, which exempts corporations from liability for their unauthorized acts, is entirely to misapprehend the whole doctrine on the subject.

No court has ever held that the defence of *ultra vires* rested upon any such ground, as that the contract sought to be enforced could not be considered as an act of the corporation. The object of the distinction, so frequently drawn, between natural persons and corporations as mere artificial existences with no powers or faculties except such as are derived from their charters, is simply to show that the latter cannot legitimately and rightfully exercise any powers but those with which they are endowed by the law which creates them, and not that they may not wrongfully exceed the just limits of those powers. The case of *Barry v. The Merchants' Exchange Company* (1 Sandf. Ch. R., 280), will serve to illustrate the force and application of the distinction. The question in that case was, whether a corporation, created for the purpose of erecting a building to be used as a public exchange, in the city of New York, had power to borrow money to enable it to accomplish the object of the incorporation, no provision conferring this power being contained in the charter. The Vice-Chancellor, in deciding this question in the affirmative, said: "Every corporation, as such, has the capacity to take and grant property, and to contract obligations *in the same manner as an individual*." This remark presents one theory in regard to the nature of corporations, which is, that unless specially restrained, they have the same power to bind themselves by contract as any natural person. The distinction referred to stands opposed to this theory, and is designed to show, that as corporations have no existence independent of their charters, they can, of course, have no powers except such as are specifically conferred.

When a corporation, sued for a breach of contract, sets up as a defence its own want of power to enter into the contract, two questions are involved: first, whether the contract was, in truth, beyond the corporate powers; and, second, if so, whether this is available as a defence. It is only in reference to the first of these questions, and to prove that the contract was really *ultra vires*, that the argument has been resorted to, that a corporation has no natural powers. The excess of power being established, the question, whether this constitutes a valid defence, depends upon entirely different considerations.

The assumption, therefore, that the doctrine, which declares the

unauthorized contract of a corporation to be void, rests in any degree upon the theory that a corporation can never be said to have done anything but what it had a legitimate right to do, is wholly unwarranted; and, hence, the irresistible logic with which it is shown that corporations must necessarily partake of the imperfection which attaches to all created things, is wholly without force in its application to the present case. Corporations, as well as natural persons, may, no doubt, err. They may exceed their powers and violate their charters, and may be held responsible for so doing. Were it otherwise, they could never be made liable for a tort; nor could they be proceeded against by *quo warranto*. The statute which authorizes the Attorney-General to file an information in the nature of a *quo warranto* against an offending corporation (2 R. S., 583, § 39), assumes that corporations may transgress the limits prescribed by their charters. Subdivision 5 of the section referred to provides that the proceeding may be instituted "whenever it (the corporation) shall exercise any franchise or privilege not conferred upon it by law."

The real ground upon which the defence of *ultra vires* rests, and the only one upon which it has ever, to any extent, been judicially based, is, that the contracts of corporations which are unauthorized by their charters are to be regarded as illegal, and, therefore, void. There are three classes of illegal contracts, viz.: those which are *mala in se*, i. e., which embrace something which the law deems in and of itself criminal or immoral; 2d, those which violate the provisions of some statute, and are hence called *mala prohibita*; and, 3d, those which contravene some principle of public policy. Corporations may make contracts falling within either of the two first of these classes, and such contracts are no doubt subject to the same rules as if made by individuals. Of course, where the only objection to the contract of a corporation is that it exceeds the corporate powers, it cannot be considered as *malum in se*; and although, in this State, where we have a statute (1 R. S., 600, § 3), expressly enacting that no corporation shall exercise any corporate powers except such as their charters confer, the contrary might, with much plausibility, be contended. I shall, nevertheless, concede, for the purposes of this case, that such contracts do not belong to the class styled *mala prohibita*.

But the contracts of corporations which are not authorized by their charters are illegal, because they are made in contravention of public policy. That contracts which do in reality contravene any principle of public policy are illegal and void, is not and cannot be denied. The doctrine is universal. There is no exception. Although the unauthorized contract may be neither *malum in se* nor *malum prohibitum*, but, on the contrary, may be for some benevolent or worthy object, as to build an almshouse or a college, or to purchase and distribute tracts or books of instruction, yet, if it is a violation of public policy for corporations to exercise powers which have never been granted to them, such contracts, notwithstanding their praiseworthy nature, are

illegal and void. Those, therefore, who hold that corporations are liable upon their contracts, notwithstanding they were made without authority, are forced to contend that no principle of public policy is violated by such contracts. This is the ground which they do take, and which, it is obvious, they must necessarily take, in order to sustain their position. Here, then, we have an issue made up, which, if I am right, is decisive of the question under consideration.

What, then, is the argument, by which it is sought to be shown that there is no principle of public policy involved in this question of the liability of corporations for their unauthorized acts? It is said that a private corporation is simply a chartered partnership, possessing certain attributes conferred by its charter for the purpose of enabling it the more conveniently to transact its business: that, even in unincorporated partnerships, the articles of copartnership always specify the objects of the association; and that, when such associations choose to become incorporated, those objects are, for the same reason, specified in the charter: that the charter simply takes the place in this respect of the articles of agreement, in the case of an unincorporated partnership: that, as the objects of such associations, although incorporated, are of a private nature, there is no question of public policy involved; and that no public interest requires that the transactions of the corporation should be kept within its chartered limits.

If we admit the soundness of this argument, and assume that the directors of a corporation are not under any public obligation to keep within their chartered powers, but are to be regarded simply as the agents of the corporators, so that any excess of power on their part amounts simply to a breach of trust towards their principals, it would not follow that the corporation is liable upon its unauthorized contracts. But I apprehend there are serious objections to this view of the nature of corporations, and of the effect of their charters. In the first place, if there is no public interest involved, how is it possible to justify the creation of private corporations at all? Such corporations are endowed with valuable franchises and privileges, which give them great advantages over mere private citizens, whether individual or associated. The grant of such privileges upon the principles for which some of my associates contend, would be a pure piece of legislative favoritism, which should be indignantly condemned. In this country, if in no other, it is held to be the duty of government to protect the people in the enjoyment of *equal* rights and privileges, and not to use its power for the special benefit of its favorites. Every privilege or advantage given to one man or set of men is necessarily at the expense of others; and it is against the fundamental principles of our government that this should be done, unless required by interests of a public nature. No doubt these principles are frequently violated, and corporate powers and privileges are conferred which no public interest demands; but, nevertheless, such interest is the ostensible reason for the grant in every case.

Take, for instance, the very class of corporations in question here, viz., railroad corporations, which are mere private associations, organized by their members with a view to their personal profit and emolument; and yet their creation is considered so much a matter of public interest as to invoke the power of eminent domain, by which the property necessary for their purposes is forcibly taken from its owners as for a public use. The same is true of telegraph and plankroad incorporations. But, although the interest of the public in the creation of corporations of this class is made a little more obvious by the necessity which exists of taking from others property which is specific and tangible, for the purposes of the corporation, yet the same principle applies to all corporations; for in all some value, corporeal or incorporeal, is taken from a portion of the community and given to the corporators.

Will it be said that, although the public have an interest in the creation of corporations, it has none in the precise extent of the powers conferred, and that no public policy is concerned in their being strictly confined to the exercise of such powers? It is, obviously, impossible to support such a position. The franchises and privileges given to corporations belong to the public; and it would be just as reasonable, and just as logical, to contend that, under a patent for one hundred acres of land, the patentee might take possession of two hundred without infringing any public interest. Every additional power given to, or usurped by, a corporation, extends its advantages over persons unincorporated. If a bank is permitted to trade in merchandise, it comes in competition with others so employed. If a railroad company is allowed to build and sail ships, it comes in competition with those engaged in commerce; and so of every other branch of business.

The importance of limiting corporate bodies to the exercise of those powers, and the enjoyment of those privileges and franchises, which have been specifically conferred upon them, must, I think, be obvious. They are rapidly multiplying. Their privileges give them decided advantages over mere private, unincorporated partnerships. They have large capitals and numerous agents, and are capable of entering into combinations with each other. They are not only formidable to individuals, but might even, under some circumstances, become formidable to the State. They are, or should be, created, as we have seen, for public reasons alone; and the legislature is presumed, in every instance, to have carefully considered the public interest, and to have granted just so much power, and so many peculiar privileges, as those interests are supposed to require. This reasoning is confirmed by the action of the legislature, in expressly prohibiting corporations from exercising any powers not granted to them. (1 R. S., 600, § 3, *supra*.) By making this principle of the common law the subject of an express and positive enactment, the legislature has shown that it considered this restriction upon corporations to be a matter of public interest and importance.

The fact that a mere excess of power on the part of a corporation, by the assumption of privileges not conferred, affords ground for a *quo warranto*, is in itself proof that the public has an interest in keeping such bodies within the limits of their charters. But it is said, that the proceeding by *quo warranto* is of a purely civil nature, designed solely to try a mere civil right, and that it in no manner assumes that any public right or interest has been infringed. Upon this position I take issue. In the first place, the assertion derives no support from, if it is not in direct conflict with, the legislative enactments on the subject. Not one of the provisions of the section by which the Attorney-General is authorized to institute proceedings in the nature of a *quo warranto*, contemplates injury to any private right as the ground of the proceeding. He is authorized to act in the following cases, viz.: Whenever a corporation shall "1st, Offend against any of the provisions of the act or acts creating, altering or renewing such corporation; or, 2d, Violate the provisions of any law, by which such corporation shall have forfeited its charter by misuser; or, 3d, Whenever it shall have forfeited its privileges and franchises by non-user; or, 4th, Whenever it shall have done or omitted any acts which amount to a surrender of its corporate rights, privileges and franchises; or, 5th, Whenever it shall exercise any franchise or privilege not conferred upon it by law." (2 R. S., 583, § 39.)

Not one of these subdivisions contemplates a case of injury to the private interests of stockholders. They all, without exception, relate to violations, not of individual rights, but of public law. These provisions, therefore, strongly, and, as I think, conclusively repel the idea, that a *quo warranto* is a mere civil remedy, the object of which is to redress or prevent a private injury. The proceeding is not only public and *quasi* criminal in form, but is not in its nature adapted to the enforcement of any mere private right. The rights of stockholders in corporations are abundantly protected against every unauthorized assumption of power, or any breach of trust on the part of their managing officers. If the violation of duty or breach of trust is only threatened, a court of equity will prevent it by injunction, and if committed will afford the proper redress. There is neither occasion for, nor propriety in, a resort to the proceedings by *quo warranto* for any mere private purpose, and I hazard nothing in saying that such is not the nature of that proceeding. If this conclusion is right, it inevitably follows that the assumption of any unauthorized power by a corporation is a violation of public policy and public right, and therefore illegal.

This, then, is the true foundation of the defence we are considering. It is permitted upon the same principle and for the same reason that a private individual is permitted to plead his own illegal act, as a defence to a suit brought to enforce a contract which public policy forbids, viz.: to discourage and restrain such violations of law. There are, no doubt, cases in which a corporation would be estopped from setting up this defence, although its contract might have been really unauthorized.

It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers.

The same principle is applicable to contracts not negotiable. Where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defence of *ultra vires* is available against him. But such a defence would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed.

A question analogous to this arises, where public officers who have done something in contravention of the statute under which they act, are afterwards sought to be estopped from setting up that their act was unauthorized. It was insisted by counsel in the case of *Regina v. White* (4 Ad. & El., N. S., 101), that for public reasons, officers so situated were not estopped; but Lord DENMAN said, "We have held that this is true only of a statute the contents of which are publicly known; such a statute is to have effect whatever dealings may take place; but when the persons acting, whether trustees for public purposes or not, have done any act which was not known to the parties with whom they were afterwards dealing, such an act cannot prevent the estoppel arising from that subsequent dealing." This doctrine, which was also held in the case of *Doe, ex dem. Levy v. Horne* (3 Ad. & El., N. S., 757), will be found, when carefully examined, to sustain the exception which I have suggested in the case of corporations. But, aside from these exceptional cases, it is, in my judgment, not only entirely clear upon principle, but abundantly settled by authority, that the contract of a corporation, if unauthorized by its charter, is an illegal contract, and that the corporation is not estopped from setting up this illegality in defence to an action brought upon it.

In referring to the cases which support these views, I will notice the English cases first.

[After commenting on various cases,]

The position then occupied by some of my associates is this: They admit that the shareholders in a corporation have a right to restrain its

directors or managers, as their trustees or agents, from entering into any contract not authorized by the charter, or from carrying such contract into effect if made; and yet they hold that the directors are liable, not in their individual, but their corporate character, to the party with whom the contract is made for not carrying it into effect. It is difficult to see how these two propositions can stand together. The directors are the mere representatives of the corporators. The latter constitute the corporation. Hence, by the two propositions just stated, it is maintained, that the corporators have a legal right to enjoin their representatives against the performance of a contract, which they themselves are legally bound to perform; in other words, they are liable for damages, because their representatives have not performed a contract, which they had a right to restrain those representatives from performing. This can hardly be. It would seem to be a legal impossibility. One or the other of these propositions must, I think, be false. Either it must be denied that the shareholders can invoke the aid of a court of equity to prevent the performance of a contract entered into by the directors, which the charter does not authorize — a principle established by numerous authorities — or it must be admitted that they are not liable for the refusal or neglect of the directors to perform it. It might be otherwise if it could be shown either that persons dealing with corporations are not presumed to know the extent of the powers conferred by the charter, or that the corporators can be presumed to have authorized the directors to transcend those powers. But the contrary is the rule in respect to both.

It would seem to follow that if we look upon the unauthorized contracts of corporate officers as mere breaches of trust, and nothing more, the corporation is not bound by them. This however is not the ground upon which I have been endeavoring to maintain that corporations are exempt from liability upon their contracts which are *ultra vires*; nor is it the ground upon which such defences have in general been sustained in suits brought by third persons against corporations upon such contracts. I shall therefore proceed further to show from the authorities that such contracts are illegal and void for public reasons, entirely irrespective of the fact that they constitute breaches of trust towards the shareholders.

[The learned judge here commented on various decisions. — ED.]

The strength of the opposing views consists in the alleged injustice of permitting a corporation to avoid obligations by pleading its own want of power to incur them. But it should be remembered, that this argument is just as applicable to the case of an individual who sets up the illegality of his own contract, and thus shields himself from responsibility upon it, as to that of a corporation. If it be said, that in the case of illegal contracts between individuals, each party is a participator in the guilt, and hence the law will not interpose to protect either; this is equally true in respect to the unauthorized contracts of corporations. Their powers are prescribed by statute, and every one who deals with

them is presumed to know the extent of these powers. Where the circumstances are such that this presumption cannot arise, as where the want of power is not apparent upon the face of the statute, but depends upon the existence of some extrinsic fact known to the corporation, but not the party dealing with it, it has been already conceded that the corporation would be estopped from setting up that its contract was *ultra vires*.

But the injustice which can ever accrue to individuals from permitting the defence in question, is trifling, under the law as now settled, compared with the importance to the public of keeping corporations within their chartered limits. It has been repeatedly held by this court, that where corporations, by means of contracts or engagements prohibited by law, *i. e.*, which are unauthorized by their charters, have obtained from other persons any money or other thing of value, while the contract itself is void and can never be enforced, the corporation may nevertheless be compelled, in a suit brought in disaffirmance of the contract and founded upon the equities of the case, to restore what it has obtained. This rule removes from corporations all temptation to engage in illegal transactions; and while it tends thus to promote the public policy of the State, it at the same time protects individuals from any gross injustice.

My conclusion, therefore, is, that the contract of the defendants to transport the plaintiffs from Chicago to Toledo was illegal and void, they having, as we have seen, no power under their charters to enter into the engagement for running their cars on joint account between those two places. It does not follow, however, that they are not liable to the plaintiff in this action. The complaint is founded upon the duty which rested upon the defendants, growing out of the relation in which they stood to the plaintiff, to take care that he should not be injured by their negligence. If this duty could only arise out of some contract between the parties, then the conclusion arrived at would be fatal to the recovery. The contract actually made by the defendants to transport the plaintiff can form no part of the plaintiff's case, and he must recover, if at all, irrespective of that contract.

It is said that if the contract was *ultra vires* and the corporation is protected from all responsibility for its violation on that ground, it must be equally free from responsibility for an injury inflicted while attempting to perform it. But this, I apprehend, by no means follows, though it is probably true so far as the duty to observe due care grew out of the contract. The plaintiff's claim, however, rests not upon his contract, but upon the right which every man has to be protected from injury through the carelessness of others. It has the same legal foundation as that of one who has been injured by the negligent driving of some person upon the public highway, or who has been run over by a train of cars, when crossing the railroad track. The duty to observe care in these cases arises, not upon any contract, but from the obligation which rests upon all persons, whether natural or artificial, so

to conduct as not through their negligence to inflict injury upon others.

It is unnecessary to cite authorities to show that corporations are liable for the culpable negligence of their servants or agents while engaged in the business of the corporation, in the same manner as individuals are liable for the negligence of themselves or their servants. It will scarcely be doubted that if the defendants' cars, through the carelessness of their employees, had run over the plaintiff, while passing upon a highway across the track of any portion of the road used by them, the corporation would have been liable. They could not set up that having no power to run their cars beyond the limits prescribed by their respective charters, all acts outside of those limits must be regarded as the acts of the individuals performing them, and not of the corporation. We have already seen that corporations may exceed their powers and may perform unauthorized acts, and incur responsibilities thereby. There is no doubt that all that was done under the arrangement between the defendants, found by the referee, unauthorized and contrary to law, is nevertheless to be treated as done by the corporations themselves. The business was carried on under the direction of their managing officers, with their property and for their benefit, and they cannot now be heard to deny that it was done by them. It follows that at least in respect to all persons with whom they had no conventional relations, their responsibilities would be precisely the same as if the business in which they were engaged was lawful.

To test the liability of the defendants, therefore, in this case, it is necessary to inquire what would be the responsibility of railroad companies in general towards persons sitting in their cars, but whom they have made no contract to transport. This must depend upon the circumstances under which the individuals had entered the cars. If they were there as mere trespassers, without shadow of right, the company would not, perhaps, be responsible for any injury they might sustain, through the negligence of its servants. But if, on the other hand, the entry into and remaining in the cars, was with the assent, express or implied, of the company, and injury should result from the negligence of the latter or its agents, the company would, I think, be responsible. It was held by this court in the case of *Nolton v. The Western Railroad Corporation* (15 N. Y., 444), that when a railroad company voluntarily undertakes to carry a passenger upon their road, although without compensation, if such passenger is injured by the culpable negligence of the agents of the company, the latter is liable, in the absence of any express agreement exempting it. The principle of that case is applicable to this. Although here, if we lay aside the contract, there was no undertaking to transport the plaintiff, either with or without compensation; yet this can make no difference, as the liability in such cases arises, not from any contract express or implied, but from the universal obligation of all persons to avoid injury to others through their negligence.

Suppose, while standing upon your own premises, you accidentally, but through sheer carelessness, discharge a gun and wound a person walking upon the highway, you are clearly liable for the injury. If the person injured, instead of being upon the highway, were in your own house with your assent, would not your liability be the same? No one can doubt it. Suppose, then, instead of being in a house with the owner's assent, the individual is in the car of a railroad company with the consent of the company, would he not have the same right to immunity from injury through the negligence of the company or its agents? This is self-evident. The company might not be liable in such a case for the careless discharge of a gun by one of its servants, because using the gun would be no part of the servant's duty to his employers. But if, through the carelessness of the engineer, the boiler of the engine should burst, and injury should ensue, the liability of the company would be clear. So, if the injury arose from a collision, running off the track, or any such cause.

It will be seen, therefore, that the question of responsibility for injuries sustained from negligence, when the person injured is within the domain or upon the premises of the party guilty of the negligence, turns upon the inquiry whether he is there lawfully or as a trespasser. It is true that when the negligence occurs in the course of the performance of some gratuitous service by the party guilty of the negligence, for the party injured, the former is only liable for gross negligence; but no question on this subject arises in the present case, as the proof in that respect will be presumed to have been such as to support the judgment, since nothing appears to the contrary.

Was the plaintiff, then, in the defendants' cars as a mere trespasser, or was he there lawfully, as between him and the defendants. To this question there can be but one answer. The defendants can never allege that the plaintiff was in their cars as a trespasser, when he was there by their express assent. The contract between him and the company, it is true, for reasons of policy could not be enforced. The defendants might at any time have repudiated it, and required the plaintiff to leave the cars; and if he refused might thereafter have treated him as a trespasser. But neither his entry into the cars, nor his remaining there until required to leave, could ever be regarded by the defendants as an infringement upon their legal rights.

It may be said that the plaintiff by consenting to travel in the defendants' cars became a participator in their unlawful conduct, and hence is not entitled to recover; but for this position there is not a shadow of authority. The law offended against by entering into the illegal contract in this case, is a law of restriction upon the defendants and not upon the plaintiff. The implied prohibitions which were violated rested solely upon them. There was no law prohibiting the plaintiff from traveling in their cars. I have already adverted to the rule that where the illegality of the contract consists in the violation of some law, the prohibitions of which are aimed at one of the parties only, the

other party is to be treated as comparatively innocent, and may have relief against the more guilty party even in an action *ex contractu*. If, then, he is entitled to enforce a mere equity against the other party *a fortiori* may he claim redress for injuries consequent upon their *tortious* acts. He is so far regarded as *particeps criminis*, that he forfeits the whole benefit of his contract. He could not recover for any failure of the company to transport him in due time or to transport him at all, whatever damages he might thereby sustain; but he cannot be said, like an outlawed felon, to have *caput lupinum* and thus to be liable to be knocked on the head like a wolf or to have his limbs broken with impunity. (4 Bl. Com., 320.) Upon these grounds I think the recovery was right, and that the judgment should be affirmed.

CLERKE, J., delivered an opinion for affirmance on the ground last stated by SELDEN, J. DENIO, J., was for reversal; all the other judges¹ were for affirmance, but without passing upon the questions discussed by COMSTOCK, Ch. J., and SELDEN, J.

Judgment affirmed.

ASHBURY RAILWAY CARRIAGE & IRON CO. v. RICHE.

1875. *Law Reports, 7 House of Lords*, 653.²

MR. JOHN ASHBURY had carried on at two places in *Lancashire* a very extensive business in making railway carriages and waggons, turn-tables, points, crossings, and roofs, and other things of a like sort needed by a railway company, but had not been concerned in the construction of railways themselves.

A company called "*The Ashbury Railway Carriage & Iron Company*," incorporated under the *Companies Act*, 1862, was started for the purpose of buying Mr. *John Ashbury's* business, and among the other articles in the agreement for its purchase was this, that the said *John Ashbury* shall not be interested (except as shareholder in a company) in "the business of a railway-carriage maker, iron manufacturer or contractor, or any other business or branch of business theretofore carried on by him at the said works."

A Memorandum of Association of the company, dated on the 12th of September, 1862, was drawn up. By the 3rd clause of this memorandum of association the objects of the company were thus defined: "The objects for which the company is established are to make and sell, or lend on hire, railway-carriages and waggons, and all kinds of railway plant, fittings, machinery, and rolling-stock; to carry on the

¹ The other judges were DAVIES, J., WRIGHT, J., BACON, J., and WELLES, J. — ED

² Statement abridged. The arguments of counsel and portions of the opinion of LORD CAIRNS, are omitted. The concurring opinions of LORDS CHILMSFORD, HATHERLEY, O'HAGAN, and SELBORNE are omitted. — ED.

business of *mechanical engineers and general contractors*; to purchase and sell, as merchants, timber, coal, metals, or other materials; and to buy and sell any such materials on commission, or as agents."

[Portions of the Articles of Association are set forth in the case.]

In 1864 Mr. *Riche*, the Defendant in Error, was carrying on business in *Belgium*, in partnership with his brother (since deceased) as a railway contractor. On the 14th of March, 1864, the Belgian Government granted to certain persons named *Gillon* and *Bertsoen* a provisional concession for making a line of railway from *Antwerp* to *Tournay*, the payment of two sums of £4000 and £16,000 being settled as what is called "caution money." The two concessionaries desired a company to be formed to carry this concession into effect. It was agreed that Messrs. *Riche* were to have the construction of the line; and in the early part of 1865 the two concessionaries and Messrs. *Riche* and the directors of the *Ashbury Company* met together, and agreed to form a company (*Société Anonyme*) to work the concession. The arrangement was for the *Ashbury Company* to purchase the concession from Messrs. *Gillon* for £70,000, and to give the contract for its construction to Messrs. *Riche*, the company thus becoming, in fact, the contractor for the construction of the line. In this negotiation Mr. *James Ashbury*, one of the directors of the English company, represented that company, and entered into the contracts. Sir *Cusack Roney* afterwards acted in the same character.

The formation of a *société anonyme* in *Belgium*, and the agreement with Messrs. *Riche* that they should construct the line—the *Ashbury* company undertaking to supply the *société anonyme* with the requisite funds—was said to have been adopted because the rails, &c., supplied by a Belgian house would be free from the duty that the Belgian Government imposed on rails imported from *England*, and consequently the profit from the construction of the line would be increased. Messrs. *Riche* began and for some time continued the works for the construction of the line; and for some time, too, the *Ashbury* directors paid, in the name of their company, money to the *société anonyme* to which Messrs. *Riche* had become entitled.

Difficulties about payment arose as the work went on, the English shareholders not adopting the views of their directors as to the speculation.

[The case sets forth various proceedings at meetings of stockholders; the claim being made by plaintiff's counsel that the stockholders of the *Ashbury Company* had ratified the contract entered into in the name of the Company.]

The *Ashbury Company* repudiated the contract for constructing the line as one *ultra vires*. Messrs. *Riche* brought this action for damages for breach of contract. The case was referred to a barrister to state a special case; the Court to be at liberty to draw inferences of fact.

The case setting forth the above matters was first heard before the Court of Exchequer. Two judges against one decided that the verdict

should be entered for the plaintiffs, the Messrs. Riche. L. R. 9 Exch. 224. The case was then taken on error to the Exchequer Chamber. The judges in that Court being equally divided, the judgment of the Court below was affirmed. L. R. 9 Exch. 249. Error was then brought to the House of Lords.

Watkin Williams, Q.C., and *Cohen*, Q.C., for the plaintiffs in error (the original defendants).

Giffard, Q.C., and *Benjamin*, Q.C. (*W. G. Harrison* with them), for defendants in error (the original plaintiffs).

LORD CAIRNS, LORD CHANCELLOR.

The action was brought by the Plaintiffs, who appear to be contractors in *Belgium*, and it was brought for damages for the breach of an agreement entered into between the Plaintiffs and the shareholders, constituting the *Ashbury Railway Carriage and Iron Company, Limited*.

These persons constituted a company established under the *Joint Stock Companies Act* of 1862. I think your Lordships will find it necessary to consider with some minuteness some of the leading provisions of that Act of Parliament. But, in the first place, you will find it convenient to ascertain the purposes for which this company was formed, and then the nature of the agreement, or contract, for the breach of which the present action was brought.

[After discussing the above points and quoting from the opinion of *Bramwell*, B., in L. R. 9 Exch. 234.]

My Lords, I agree entirely, both with the description given here by Mr. Baron *Bramwell* of the nature of the contract and with the conclusion at which he arrived, that a contract of this kind was not within the words of the memorandum of association. In point of fact it was not a contract in which, as the memorandum of association implies, the limited company were to be the employed, they were the employers. They purchased the concession of a railway — an object not at all within the memorandum of association; and having purchased that, they employed, or they contracted to pay, as persons employing, the Plaintiffs in the present action, as the persons who were to construct it. That was reversing entirely the whole hypothesis of the memorandum of association, and was the making of a contract not included within, but foreign to, the words of the memorandum of association.

Those being the results of the documents to which I have referred, I will ask your Lordships now to consider the effect of the Act of Parliament — the *Joint Stock Companies Act* of 1862 — on this state of things. And here, my Lords, I cannot but regret that by the two Judges in the Court of Exchequer the accurate and precise bearing of that Act of Parliament upon the present case appears to me to have been entirely overlooked or misapprehended: and that in the Court of Exchequer Chamber, speaking of the opinion of those learned Judges

who thought that the decision of the Court of Exchequer should be maintained, the weight which was given to the provisions of this Act of Parliament appears to me to have entirely fallen short of that which ought to have been given to it. Your Lordships are well aware that this is the Act which put upon its present permanent footing the regulation of joint stock companies, and more especially of those joint stock companies which were to be authorized to trade with a limit to their liability.

The provisions under which that system of limiting liability was inaugurated, were provisions not merely, perhaps I might say not mainly, for the benefit of the shareholders for the time being in the company, but were enactments intended also to provide for the interests of two other very important bodies; in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and, secondly, the outside public, and more particularly those who might be creditors of companies of this kind. And I will ask your Lordships to observe, as I refer to some of the clauses, the marked and entire difference there is between the two documents which form the title deeds of companies of this description—I mean the Memorandum of Association on the one hand, and the Articles of Association on the other hand. With regard to the memorandum of association, your Lordships will find, as has often already been pointed out, although it appears somewhat to have been overlooked in the present case, that that is, as it were, the charter, and defines the limitation of the powers of a company to be established under the Act. With regard to the articles of association, those articles play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, the rights and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. With regard, therefore, to the memorandum of association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise whether that which is so done is *ultra vires*, not only of the directors of the company, but of the company itself. With regard to the articles of association, if you find anything which, still keeping within the memorandum of association, is a violation of the articles of association, or in excess of them, the question will arise whether that is anything more than an act *extra vires* the directors, but *intra vires* the company.

[Here his Lordship quoted and commented upon various clauses of the Companies Act of 1862.]

The memorandum of association is, as it were, the area beyond which the action of the company cannot go; inside that area the share-

holders may make such regulations for their own government as they think fit.

Now, my Lords, bearing in mind the difference which I have just taken the liberty of pointing out to your Lordships between the memorandum and the articles, we arrive at once at all which appears to me to be necessary for the purpose of deciding this case. I have used the expressions *extra vires* and *intra vires*. I prefer either expression very much to one which occasionally has been used in the judgments in the present case, and has also been used in other cases, the expression "illegality."

In a case such as that which your Lordships have now to deal with, it is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy, and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract. Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, "That is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company," the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing.

But, my Lords, if the shareholders of this company could not *ab ante* have authorized a contract of this kind to be made, how could they subsequently sanction the contract after it had, in point of fact, been made. I endeavoured to follow as accurately as I could, the very able argument of Mr. *Benjamin* at your Lordships' Bar on this point; but it appeared to me that this was a difficulty with which he was entirely unable to grapple. He endeavoured to contend that when the shareholders had found that something had been done by the directors which ought not to have been done, they might be authorized to make the best they could of a difficulty into which they had thus been thrown, and therefrom might be deemed to possess power to sanction the contract being proceeded with. My Lords, I am unable to adopt that suggestion. It appears to me that it would be perfectly fatal to the whole scheme of legislation to which I have referred, if you were to hold that, in the first place, directors might do that which even the

whole company could not do, and that then, the shareholders finding out what had been done, could sanction, subsequently, what they could not antecedently have authorized.

My Lords, if this be the proper view of the Act of Parliament, it reconciles, as it appears to me, the opinion of all the Judges of the Court of Exchequer Chamber; because I find Mr. Justice *Blackburn*, whose judgment was concurred in by two other Judges who took the same view, expressing himself thus:¹ “I do not entertain any doubt that if, on the true construction of a statute creating a corporation it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified.” My Lords, that sums up and exhausts the whole case. In my opinion, beyond all doubt, on the true construction of the statute of 1862, creating this corporation, it appears that it was the intention of the Legislature, not implied, but actually expressed, that the corporation should not enter, having regard to its memorandum of association, into a contract of this description. If so, according to the words of Mr. Justice *Blackburn*, every Court, whether of law or of equity, is bound to treat that contract, entered into contrary to the enactment, I will not say as illegal, but as *extra vires*, and wholly null and void, and to hold also that a contract wholly void cannot be ratified.

My Lords, that relieves me, and, if your Lordships agree with me, relieves your Lordships from any question with regard to ratification. I am bound to say that if ratification had to be considered I have found in this case no evidence which to my mind is at all sufficient to prove ratification; but I desire to say that I do not wish to found my opinion on any question of ratification. This contract, in my judgment, could not have been ratified by the unanimous assent of the whole corporation.

I have only to add to what I have already said, that I observe that some cases have been referred to here—those arising out [of] the *Agriculturist Cattle Insurance Company* in your Lordships’ House,² and the case of the *Phosphate of Lime Company v. Green*, in the Court of Common Pleas³—as if they had some bearing on the present question. Those cases have a bearing upon some of the observations with which I have troubled your Lordships. They are cases which illustrate extremely well what I have said just now, that the articles of association of a company of this kind are the documents which define the power of directors as between themselves and the company. In those cases which I have mentioned the whole question was, whether the directors

¹ Law Rep. 9 Ex. 262.

² *Spackman v. Evans*, Law Rep. 3 H. L. 171; *Evans v. Smallcombe*, Ibid. 249; *Houldsworth v. Evans*, Ibid. 263.

³ Law Rep. 7 C. P. 43.

had gone beyond the powers which were entrusted to them, and by which their authority was limited under the articles of association, or whether that which had been agreed to had been duly performed. In no one of those cases was there any question as to whether the power of the whole company had been exceeded.

Those cases have no application whatever to the present case. The present case stands upon the power, not of the directors alone, but of the whole company as settled by the Act of Parliament.

My Lords, for the reasons which I have thus endeavoured to express, I submit to your Lordships and move your Lordships that the judgment in the present case should be reversed, and judgment entered for the Defendants.

DAVIS *v.* OLD COLONY R. CO.
DAVIS *v.* SMITH AMER. ORGAN CO.

1881. 131 *Mass.* 258.¹

GRAY, C. J. These actions are brought upon an agreement, signed by the Old Colony Railroad Company in the sum of \$6000, and by the Smith American Organ Company in the sum of \$5000, and by other corporations, partnerships and individuals in various sums, amounting in all to more than \$200,000.

The agreement is in these words: "Boston, January 23, 1872. We the undersigned subscribers hereby agree, each with the other, that we will contribute towards any deficiency (should there be one) that may arise towards defraying the expenses of the World's Peace Jubilee and International Musical Festival, to be held in Boston, commencing on the 17th of June and closing on the 4th of July next, in such proportions as the amounts affixed to our several names bear to the whole amount subscribed: provided that no subscription shall be binding until the whole amount subscribed shall reach the sum of two hundred thousand dollars, and that no expenditure be incurred except under the authority of the executive committee, which committee shall represent the subscribers, and consist of ten or more persons, who may be chosen by the first six subscribers hereto."

At the trial of the first action, the plaintiffs offered to prove that the signature of each corporation was made by authority of its directors, with the reasonable belief that the holding of the festival proposed would be of great pecuniary benefit to the corporation by increasing its proper business, and that the signature would promote such holding;

¹ A large part of the opinion has been omitted. The omissions consist mostly of statements of reported cases and extracts from the opinions in such cases. — Ed.

that the festival was held as mentioned in the agreement of guaranty; and that the reasonable expenditures therefor, made under authority of the plaintiffs, who relied upon that agreement in making them, exceeded the receipts by more than \$200,000.

The only point argued and decided when one of these cases was before us upon demurrer to the declaration was, that the promise of the subscribers was to the executive committee therein mentioned, and that these plaintiffs as such committee were the proper parties to sue thereon. *Davis v. Smith American Organ Co.* 117 Mass. 456.

The principal question now presented by the answer, and which lies at the threshold of each case, is whether it was within the power of the defendant corporation to bind itself by such an agreement. Upon full consideration of the elaborate arguments of counsel upon that question, the court is of opinion that the agreement is *ultra vires*, and therefore, no action can be maintained upon it against either defendant.

The reported cases on the subject are so numerous, that we shall refer to comparatively few of them, except the principal cases in England and the decisions of the Supreme Court of the United States and of this court.

A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation.

Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, especially where, as in this Commonwealth, all acts of incorporation are deemed public acts, and every corporation organized under general laws is required to file in the office of the Secretary of the Commonwealth a certificate showing the purpose for which the corporation is constituted. Gen. Sts. c. 3, § 5. St. 1870, c. 224, §§ 7, 11. *Whittenton Mills v. Upton*, 10 Gray, 582, 598. *Richardson v. Sibley*, 11 Allen, 65, 72. *Pearce v. Madison & Indianapolis Railroad*, 21 How. 441, 443. *East Anglian Railways v. Eastern Counties Railway*, 11 C. B. 775, 811. *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653.

There is a clear distinction, as was pointed out by Mr. Justice Campbell in *Zabriskie v. Cleveland, Columbus & Cincinnati Railroad*, 23 How. 381, 398, by Mr. Justice Hoar in *Monument Bank v. Globe*

Works, 101 Mass. 57, 58, and by Lord Chancellor Cairns and Lord Hatherley in *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 668, 684, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance, when such abuse or failure is not known to the other contracting party.

[After stating, and commenting upon, numerous cases, the opinion proceeds:]

Several of the cases most relied on by the plaintiffs were not suits against a corporation to compel it to pay money for a purpose not within the scope of its charter, but suits by a corporation to recover money or property, which, when recovered, would be held for the lawful uses of the corporation. *Chester Glass Co. v. Dewey*, 16 Mass. 94. *Old Colony Railroad v. Evans*, 6 Gray, 25. *National Pemberton Bank v. Porter*, 125 Mass. 333. *National Bank v. Matthews*, 98 U. S. 621.

[After stating, and commenting upon, these cases, the opinion proceeds:]

A corporation may indeed be bound to refund to a person, from whom it has received money or property for a purpose unauthorized by its charter, the value of that which it has actually received; for, in such a case, to maintain the action against the corporation is not to affirm, but to disaffirm, the illegal contract. *White v. Franklin Bank*, 22 Pick. 181. *Morville v. American Tract Society*, 123 Mass. 129, 137. *In re Cork & Youghal Railway*, L. R. 4 Ch. 748. But when the corporation has actually received nothing in money or property, it cannot be held liable upon an agreement to share in, or to guarantee the profits of, an enterprise which is wholly without the scope of its corporate powers, upon the mere ground that conjectural or speculative benefits were believed by its officers to be likely to result from the making of the agreement, and that the other party has incurred expenses upon the faith of it. *East Anglian Railways v. Eastern Counties Railway*, *Macgregor v. Dover & Deal Railway*, *Ashbury Railway Carriage & Iron Co. v. Riche* and *Thomas v. Railway Co.*, above cited. *Downing v. Mt. Washington Road Co.* 40 N. H. 230. *Franklin Co. v. Lewiston Institution for Savings*, 68 Maine, 43.

The Old Colony Railroad Company is a railroad corporation, established by public statutes of the Commonwealth for the purpose of constructing and maintaining a railroad and carrying passengers and freight thereon. Sts. 1844, c. 150; 1854, c. 133; 1862, c. 149; 1872, c. 143. The holding of a "world's peace jubilee and international musical festival" is an enterprise wholly outside the objects for which a railroad corporation is established; and a contract to pay, or to guarantee the payment of, the expenses of such an enterprise, is neither a necessary nor an appropriate means of carrying on the business of

the railroad corporation, is an application of its funds to an object unauthorized and impliedly prohibited by its charter, and is beyond its corporate powers. Such a contract cannot be held to bind the corporation, by reason of the supposed benefit which it may derive from an increase of passengers over its road, upon any grounds that would not hold it equally bound by a contract to partake in or to guarantee the success of any enterprise that might attract population or travel to any city or town upon or near its line. It follows that in the first of the actions before us there must be *Judgment for the defendant.*

The same reasons are no less applicable to manufacturing and trading corporations, established under general laws, and the purposes of which are required by those laws to be stated in their articles of association. The Smith American Organ Company was organized under the general act of 1870, c. 224, and the purposes of its incorporation are limited by its articles of association, as appearing in the certificate thereof filed in the office of the Secretary of the Commonwealth pursuant to that act, to "the manufacture and sale of reed organs and other musical instruments." The power to manufacture and sell goods of a particular description does not include the power to partake in, or to guarantee the profits of, an enterprise that may be expected to increase the use of or the demand for such goods. The case of *Ashbury Railway Carriage & Iron Co. v. Riche*, before cited, is directly in point.

This ground being decisive of the second action, it becomes unnecessary to consider the other objections to its maintenance, and the plaintiffs' exceptions must be *Overruled.*

M. F. Dickinson, Jr. & J. Fox, for the plaintiffs.

J. H. Benton, Jr., for the defendant in the first case.

R. D. Smith, (*C. Allen* with him,) for the other defendant.

DENVER FIRE INS. CO. v. McCLELLAND.

1885. 9 *Colorado*, 11.¹

ACTION by McClelland (plaintiff below) against Insurance Company.

Plaintiff's complaint alleges that, on June 12, 1882, defendant company issued a policy insuring plaintiff's growing crops against loss or damage by hail; that this policy was issued in consideration of \$3.00 cash paid by plaintiff, and also of a note for \$58.03 executed and delivered by plaintiff to defendant; and that on June 19, 1882, plaintiff's crops were damaged by hail.

Defendants' answer set up, as second defence, that the defendant company's articles of incorporation were duly recorded in two public

¹ Statement abridged. Portions of opinions omitted. — Ed.

offices long before the issuing of said policy; that under said articles the company has no authority to insure growing crops against damage by hail; and is authorized to insure property only against damage by fire or lightning.

The plaintiff demurred to this second defence. The demurrer was sustained. After assessment of damages, judgment was rendered for plaintiff, and the Insurance Company appealed.

Stallcup, Luthe & Shaffroth, and *Teller & Orahood*, for appellant.
Norville & Clark, and *T. M. Robinson*, for appellee.

STONE, J.

In the case before us the contract, as made by the parties, appears to have been fully executed on the part of the appellee, so far as his right of action when brought was affected by it. He had paid a small portion of money on the amount of the premium agreed to be paid and had given a promissory note for the balance. This was all he had agreed to do; all that had been exacted of him by the insurance company, and this he had performed. It matters not that the note had not been paid, for it was not due when his right of action accrued and when he brought his suit.

The sole defense upon which the appellant company relies here is its want of authority to insure against hail. By offering to insure the property of appellee against damage by hail, and by entering into the contract of insurance therefor, it claimed to possess the power so to do. It took the appellee's money and assumed the risk and obligation of paying the damage, much or little, that might occur, or of having nothing at all to pay, if the contingency of damage should not happen within the time covered by the policy.

A loss having occurred, the company seeks exemption from the obligation it entered into by denying that it had any authority to do what it asserted the right to do when it voluntarily assumed the undertaking.

We are aware that the courts have been very slow to concede that a defendant setting up as a defense the *ultra vires* of a contract, where said contract was clearly not authorized, should be held liable on the contract, since this would appear to sustain the enforcement of an unauthorized contract, and therefore the cases show that whenever the courts would avoid this seeming inconsistency by resting the recovery upon some other ground they have done so. This has often led to equal inconsistency in other directions. The true ground would seem to be that of equitable estoppel, whereby the defendant is not permitted to rely upon or show the invalidity of the contract. In such case, the contract is assumed by the court to be valid, the party seeking to avoid it not being permitted to attack its character in this respect.

The point was strongly insisted upon by counsel for appellant in

argument, that one dealing with a corporation is bound to know the extent of its powers to contract, that the corporate name itself indicates the scope of its business, and the record of its charter or articles of incorporation furnishes notice of the extent and limitation of its corporate powers and authority to contract.

While as a general proposition this is true, yet it must be conceded that this constructive notice is of a very vague and shadowy character. Every one may have access to the statutes of the states affecting companies incorporated thereunder, and to their articles of incorporation, but to impute a knowledge of the probable construction the courts would put upon these statutes and articles of incorporation to determine questions raised upon a given contract proposed, is carrying the doctrine of notice to an extent which can only be denominated preposterous. It was in answer to the same point that Chief Justice Comstock observed, in his opinion in a leading case upon this question, that "a traveler from New York to Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations." *Bissel v. M. S. & N. I. R. R. Co.* 22 N. Y. 258.

The principle of estoppel by conduct is the same principle which is applied by courts in holding that the statute of frauds, by which, under the general rule, a contract would be void, is never to be used for the protection of a fraud.

We do not say that the directors or acting officers of such company may act in excess of their legitimate powers against the interests and contrary to the will of the stockholders of such company, but while admitting the excess of proper authority, we think, on principle and the weight of modern decisions, that if the stockholders, whose business it is to see that their own managing officers act within the proper scope of their powers, either expressly, or by silence impliedly, assent to acts done on their behalf in excess of authority, they should be held estopped to deny that such acts were authorized.

The appellant company here offered to pay back the money and return or cancel the note given for the policy, and counsel urgently contended that this is all that legally can or rightfully ought to be exacted. This would not place the appellee *in statu quo*. Every insurance company would be ready and willing to do that much after the loss had occurred, on condition of exemption from payment of the loss. The damage to appellee is the loss of his crops against which the appellant undertook to secure him. After the loss it was too late for appellee to insure in another company having unquestioned authority to insure against such loss.

We therefore conclude that since the contract of insurance, though it may have been beyond the scope of the proper object and purposes of the company as expressed and conferred by their articles of incorpora-

tion, was neither by statute nor by their charter expressly forbidden, nor in its nature illegal or improper, and since the conduct of the company in soliciting the insurance and entering into the contract therefor under the circumstances disclosed by this case was such that to exempt it from its engagements thereunder would result in injuring and defrauding the appellee, who in good faith dealt with the company under the belief of its rightful authority in the premises, the defense of the appellant company interposed against its liability on the contract is inequitable, unconscionable, and should not be allowed.

The judgment of the court below is affirmed.

Affirmed.

BECK, C. J., and HELM, J., concurring. Private corporations are creatures of statute, and derive their powers solely therefrom. Upon weighty considerations of public policy, and of private equity as well, the principle has been universally recognized that the charters or general laws through which these corporations derive their existence absolutely control their action; that a contract made or an act done by them which is not in any manner authorized by some express provision of the charter or law of incorporation, or which may not be clearly implied therefrom, is *ultra vires*; and that such usurpation of power may be relied upon as a complete defense to a suit growing out of the unauthorized act or contract.

But, for the purpose of avoiding the infliction of manifest injustice in given cases, many courts of the highest respectability have seen fit to recognize an exception to the foregoing doctrine. This exception, when admitted, is always based upon principles largely analogous to those supporting equitable estoppels. The decisions recognizing it hold that where a corporation receives and retains the full benefit of a contract, and a failure to perform on its side would result in palpable injustice to the other contracting party, it is estopped from escaping liability thereunder through a plea of *ultra vires*.

We are inclined to the opinion that cases sometimes arise wherein this exception, properly understood and limited, should be held applicable. If a private corporation has accepted and retained the full benefits of a contract which it had no power to make, the same having been performed by the other party thereto; and if the transaction is of such a nature that the party thus performing will suffer manifest injustice and hardship unless permitted to maintain his action directly upon the contract, no other adequate relief being at his command, we think the defense of *ultra vires* may be disallowed. This, however, does not do away with the objectionable character of the unauthorized contract. It admits the legal wrong committed by the usurpation of power, but denies the equitable right of the corporation to profit through such wrong at the expense of parties contracting with it; the corporation, having received and retained the benefit of the contract, is denied the

privilege of invoking the illegality of its act, and thus avoiding consequences naturally flowing therefrom.

The circumstances attending and surrounding the transaction now before us, in our judgment, render this an appropriate case for the application of the foregoing equitable doctrine. For this reason we concur in the conclusion arrived at by Mr. Justice Stone, who writes the principal opinion.

Affirmed.

NATIONAL HOME BUILDING AND LOAN ASSOCIATION
v. HOME SAVINGS BANK.

1899. 181 Illinois, 35.¹

IN 1893, Flora D. Bishopp conveyed lot 5 in a certain block to the National Home Building and Loan Association; and in the deed it was agreed that the association should assume and pay an encumbrance on said lot in the form of a trust deed executed by said Flora to Page, trustee, to secure a note for \$3,000. Subsequently, the association tendered a quit-claim deed of the lot to Flora D. Bishopp. The note secured by the trust deed was transferred to the Home Savings Bank; and said bank filed a bill to foreclose, asking for a sale of the mortgaged premises and for a decree against the association for such deficiency as might exist. After a report by a master, a decree was entered in the court below for a sale, and also a decree against the association for any deficiency in the payment of the debt. The association appealed.

Cutting, Castle & Williams, and Wagner, Bingham & Long, for appellant.

Winston & Meagher, and Alexander L. Whitehall (Ralph Martin Shaw, of counsel), for appellee.

CARTWRIGHT, C. J.

No objection is made to the foreclosure of the trust deed or the sale of the premises, and the only question involved in this appeal is whether the contract inserted in the deed, by which the defendant, the National Home Building and Loan Association, agreed to assume and pay the debt, is binding upon it. This defendant, which denied the binding force of the agreement, is a corporation organized under the provisions of an act entitled "An act to enable associations of persons to become a body corporate to raise funds to be loaned only among the members of such association," in force July 1, 1879. (Laws of 1879, p. 83.) As a corporation it is a creature of the law, having no powers but those which the law has conferred upon it. A corporation has no natural rights or capacities, such as an individual

¹ Statement abridged. Arguments and part of opinion omitted. — ED.

or an ordinary partnership, and if a power is claimed for it, the words giving the power or from which it is necessarily implied must be found in the charter or it does not exist. The law on this subject is stated by the Supreme Court of the United States in *Central Transportation Co. v. Pullman Palace Car Co.* 139 U. S. 24, as follows: "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental." The purpose of this corporation is the raising of funds to be loaned to its members upon the security of its stock and unencumbered real estate. Manifestly the business of trading in real estate or acquiring the same, except as incidental to their legitimate business, is wholly foreign to the purpose for which the State has created such corporations and conferred upon them corporate powers. They have no power to take and hold real estate, and contracts made for the purchase of it are not enforceable. (Endlich on Building Associations, secs. 305-308.) But for the purpose of collecting debts it is essential that they should have some power with respect to the real estate mortgaged to them, and for that purpose section 13 of the act for their incorporation provides as follows: "Any loan or building association incorporated by or under this act is hereby authorized and empowered to purchase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate upon which such association may have or hold any mortgage, lien or other encumbrance, or in which said association may have an interest, and the real estate so purchased, to sell, convey, lease or mortgage at pleasure to any person or persons whatsoever." Such corporations are not authorized, either by their charters or as an incident to their existence, to acquire or hold any real estate, except such as has been mortgaged to them or which they may have an interest in. Not only is this the rule to be derived from the act of the legislature authorizing their incorporation, under the general principles of law, but it is, and always has been, against the policy of the State to permit corporations to accumulate landed estates, or to own real estate beyond what is necessary for their corporate business or such as is acquired in the collection of debts. (*Carroll v. City of East St. Louis*, 67 Ill. 568; *United States Trust Co. v. Lee*, id. 142; *People v. Pullman Palace Car Co.* 175 id. 125; *First M. E. Church of Chicago v. Dixon*, 178 id. 260.) It is also a settled principle of American jurisprudence. (5 Thompson's Law of Corporations, sec. 5772.) If a building and loan association were permitted to invest its money in the purchase of real estate or to traffic or trade in such property instead of keeping within the powers conferred upon it by loaning such money and collecting it, it would not only be exercising powers not granted, but it would be carrying on a business inconsistent with the purpose of its creation and against the fixed and uniform policy of the State. In *People ex rel. v. Chicago Gas Trust Co.* 130 Ill. 268, it was said (p. 292): "The word 'unlaw-

ful,' as applied to corporations, is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do, — or, in other words, such acts, powers and contracts as are *ultra vires*." In *Central Transportation Co. v. Pullman Palace Car Co. supra*, the result of the decisions as to the exercise of powers not granted is summed up, as follows: "All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, — and this upon three distinct grounds: the obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

It is also argued that the building and loan association is estopped to raise the question whether the contract was *ultra vires* because it has received the benefit of the contract by the conveyance of property to it. That depends, as we think, upon the sense in which the term *ultra vires* is used. It has been applied indiscriminately to different states of fact in such a way as to cause considerable confusion. When used as applicable to some conditions, it has been frequently said that a corporation is estopped to make such a defense where it has received the benefit of the contract. For example, the term has been applied to acts of directors or officers which are outside and beyond the scope of their authority, and therefore are invasions of the rights of stockholders, but which are within the powers of the corporation. In such a case the act may become binding by ratification, consent and acquiescence, or by the corporation receiving the benefit of the contract. Again, it has been applied to cases where an act was within the authority of the corporation for some purposes or under some circumstances, and where one dealing in good faith with the corporation had a right to assume the existence of the conditions which would authorize the act. Where an act is not *ultra vires* for want of power in the corporation but for want of power in the agent or officer, or because of the disregard of formalities which the law requires to be observed, or is an improper use of one of the enumerated powers, it may be valid as to third persons. In the more proper and legitimate use of the term it applies only to acts which are beyond the purpose of the corporation, which could not be sanctioned by the stockholders. There would, of course, be no power to confirm or ratify a contract of that kind, because the power to enter into it is absolutely wanting. If there is no power to make the contract there can be no power to ratify it, and it would seem clear that the opposite party could not take away the incapacity and give the contract vital-

ity by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a contract, by way of estoppel, through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power.

The powers delegated by the State to the corporation are matters of public law, of which no one can plead ignorance. A party dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of them and their limitations, and can not plead ignorance in avoidance of the defense. (*Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43; *New Orleans, Florida and Havana Steamship Co. v. Ocean Dry Dock Co.* 28 La. Ann. 173.)

[After quoting from *Thomas v. West Jersey R. Co.*, and *Central Transportation Co. v. Pullman Palace Car Co.*] In *Durkee v. People*, 155 Ill. 354, the same rules were laid down, and it was pointed out that the cases where a corporation is estopped from asserting that a contract is *ultra vires* when it has received a benefit under the contract is where the making of the contract is within the scope of the franchise, and the contract is sought to be avoided because there was a failure to comply with some regulation or the power was improperly exercised. The following was there quoted from the opinion in *Davis v. Old Colony Railroad Co.* 131 Mass. 258: "There is a clear distinction, as was pointed out by Mr. Justice Campbell in *Zabriskie v. Cleveland, Columbus and Cincinnati Railroad Co.*, by Mr. Justice Hoar in *Monument Bank v. Globe Works*, and by Lord Chancellor Cairns and Lord Hatherley in *Ashbury Railway Carriage and Iron Co. v. Riche*, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice, and the abuse of a general power or the failure to comply with prescribed formalities or regulations in a peculiar instance, when such abuse or failure is not known to the other contracting parties."

The cases in this court where the corporation has been held to be estopped have been where the act complained of was within the general scope of the corporate powers.

[The learned judge here commented on *Ottawa Northern Plank Road Co. v. Murray*, 15 Ill. 336; *Bradley v. Ballard*, 55 Ill. 413; *Darst v. Gale*, 83 Ill. 136; and *Kadish v. Garden City, &c. Association*, 151 Ill. 531.]

In this case the transaction was beyond the corporate powers and *ultra vires* in the strict and legitimate sense, and against public policy. It could not be ratified or become valid by acquiescence, since there was no power to make it. Flora D. Bishopp, who dealt with the corporation, was chargeable with notice of its powers and their limitations and its inability to enter into the contract. She

could not make the void contract valid by acting under it. No action can be maintained upon the unlawful contract, and in such cases, if the courts can afford any remedy, it cannot be done by affirming or enforcing the contract, but in some other manner.

The decree of the superior court against the National Home Building and Loan Association for any deficiency that may exist, and for execution to collect the same, and the judgment of the Appellate Court affirming said decree in that respect, are each reversed.

Judgment reversed.

MR. JUSTICE CARTER, dissenting:

I do not agree to the doctrine announced in the decision of this case, that a corporation may not be estopped from pleading its own lack of corporate power. As I understand the decisions, it has long been the settled doctrine of this court that where the contract has been wholly executed and the corporation has received the benefit of it, it will be estopped from setting up in defense of payment its own lack of power, under its charter, to enter into the contract, where the contract is not one either *malum in se* or *malum prohibitum*. I do not understand that the application of the doctrine of estoppel is confined to those cases where the contract is within the powers of the corporation, but only beyond the mere authority of its officers or agents. The doctrine of estoppel does not rest upon the principle of agency that there may be a ratification of the unauthorized acts of agents. It has been held, not only by this court but by many others, that in many cases the question of *ultra vires* can only be raised in a direct proceeding by the State to oust the corporation of its assumed and usurped powers. *Bradley v. Ballard*, 55 Ill. 413; *Kadish v. Garden City Building Ass.* 151 id. 531; *McNulta v. Corn Belt Bank*, 164 id. 427; *Eckman v. Chicago, Burlington and Quincy Railroad Co.* 169 id. 312; *Darst v. Gale*, 83 id. 136.

[Extracts from an article on "The unauthorized or prohibited exercise of corporate power," by Prof. George Wharton Pepper; 9 Harvard Law Review, pp. 255-272.]

It is of course true that in modern times there has been a steady movement in the direction of enforcing unauthorized and prohibited contracts as between the parties. . . . It is a movement which has resulted from a new judicial conception of public policy, and from a more or less careful study of the needs of the business world. It is a movement of vast importance, and it is fraught with as much interest for the student as any tendency in modern legal development.

If this modern development is treated as being independent of moral considerations, and as being the result of the gradual substitution of a new theory of public policy for the old, a most interesting and important question presents itself. Is the interest of the community best subserved by adhering to the theory that a corporation is a legal person with limited powers, or by disregarding this theory in the determination to enforce all contracts, not immoral, which have been in fact entered into between the parties? If the former view were to prevail, it would follow that contracts made in excess of corporate power or in defiance of statutory prohibition should receive judicial condemnation of a more or less severe character.

If we turn to the second of the two possible views of public policy in respect of corporate contracts, we must expect to find an entirely different development. When a court makes up its mind to enforce, as between the parties, a contract which is wholly foreign to the business of the corporation, and perhaps specifically prohibited by statute, it must be prepared to deal, sooner or later, with two legal problems. In the first place, there is the difficulty which results from the theory of special capacities. Under this theory, which is strongly asserted in a multitude of American cases,¹ a corporation has no powers except such as are conferred by the grant contained in the charter. Under the doctrine of general capacities, the effect of incorporation is to create a legal person with the powers of every other legal person with respect to contracts, subject to such prohibitions upon the exercise of certain powers as the charter may impose. Under the former theory a corporation has power to make certain contracts only, and, by supposition, the suggested contract is not one of them. Without power there can be no contract. If there is no contract, there is nothing to enforce. It is the case of the contract of a married woman. This difficulty can, in the judgment of the writer, be overcome in one way only, — by discarding the doctrine of special capacities and by adopting the doctrine of general capacities. A corporation would then stand upon the footing of a natural person, with power to make every kind of contract, subject to such penalties as the sovereign might impose for violating prohibitions upon making any particular form of contract. If a banking corporation were forbidden to do an insurance business, but nevertheless issued a policy, it would be perfectly reasonable for the courts to permit the assured to recover against the company upon the ground that the prohibition did not involve the invalidity of the contract as a penalty,² but that the prohibition was

¹ For example, in *Thomas v. R. R. Co.*, 101 U. S. 71; refusing to assent to the argument of counsel for plaintiff, who made a strong plea for the recognition of the doctrine of general capacities.

² The Supreme Court of the United States in a well known case, *National Bank v. Matthews*, 98 U. S. 621 (1878), took this view of the provision in the National Banking Act forbidding banks to lend money on real estate security. See also the language of Mr. Justice Field in *National Bank v. Whitney*, 103 U. S. 99 (1880).

merely a condition subsequent in the grant of franchises by the sovereign, for a breach of which the sovereign might resume them if desired. It is well known that the doctrine of general capacities is the doctrine of the English courts; but those courts have treated the designation of a field of activity in the charter as a statutory prohibition against engaging in any other field of activity, and they have steadfastly refused to enforce all prohibited contracts. In other words, they have maintained the legal theory in its integrity, but they have deemed that the doctrine of general capacities must be held in check by some vigorous rule of contrary tendency, lest corporations should become all powerful. Of the English courts, therefore, it may be said that their adherence to the doctrine of general capacities is no indication of sympathy with the second view of public policy under discussion. With them this theory of corporate power is the result of a conviction that it best accords with the common law theory of the effect of incorporation.¹ It follows that, while the result of the English decisions could, on principle, be reached equally well on the doctrine of special capacities, yet the American decisions which proceed upon the policy now under discussion can be justified, on principle, only on the doctrine of general capacities, coupled with the view that a prohibition, express or implied, is a collateral condition or penalty to be enforced by the State. The American courts, nevertheless, are constantly asserting the doctrine of special capacities in much the same language as that used by Judge Thompson, while at the same time they are enforcing between the parties contracts which are not merely unauthorized, but actually prohibited. In other words, they sacrifice legal theory in the interest of their chosen policy.

The second legal obstacle which the courts must meet and overcome, if the view in question is to prevail, is the resulting difficulty of maintaining any theory whatever which places limitations upon the corporate power to contract. It will be observed that the exigencies of the policy under discussion require the courts to enforce *ultra vires* contracts as between the parties, leaving the State to institute proceedings, by *quo warranto* or otherwise, to deprive the offending body of its charter. But in point of fact, in ninety-nine cases out of a hundred the State has no real interest in the matter. Even in those cases in which we lawyers are accustomed to speak more glibly of "public interest," it often happens that the conventional conception of the interest of the community is just the reverse of its interest in fact. Take the case of a railway lease which has not been specifically authorized. The lessor refuses to perform certain covenants, and an effort is made to compel specific performance. In no jurisdiction will the desired decree be made, because it is the conventional

¹ See for a discussion of this point the Appendix on "Limits of Corporate Power" in Pollock on Contracts.

view that the public is interested in seeing to it that no one but the original grantee of the franchise shall exercise it.

In the absence of direct interest there is no reason to expect active interference with corporate activity in any considerable number of cases. There is even a decision in the books in which the right of the State to forfeit a charter in such a case is denied. We should then have a law practically without a sanction in the matter of restraint upon the making of corporate contracts. This state of affairs is to some extent recognized; but it does not seem to be perceived that a significant alternative is presented to the judges in consequence of it. Shall the courts continue to maintain some theory of limited corporate power, or shall they take the absence of real public interest in so vast a number of cases as an indication that the so called "law of *ultra vires*" has survived whatever usefulness it may have possessed? Apparently unconscious of the existence of this problem, the courts have undertaken the task contemplated by the former alternative, and have set themselves to discourage unauthorized and prohibited contracts by enforcing them between the parties only in favor of one who has performed his part. Readiness to perform is not enough: the contract must be executed in part before the judge will give it recognition. Here is a fruitful source of litigation. What constitutes execution within the meaning of the rule? Is execution synonymous with that "passage of money or property" which would give rise to a cause of action in quasi contract, even under the former of our two conceptions of public policy? These and many other similar questions confront the courts in their attempt to signify a qualified disapproval of unauthorized or prohibited contracts.

What of the second alternative? Is there any reason, on principle, why the courts which believe in treating the prohibition as a condition should not carry out the theory to the end, and enforce all corporate contracts precisely like other contracts, and subject only to the limitations which the general law of contracts recognizes? It seems to the writer that, if the doctrine of general capacities were once adopted, a strict adherence to our second line of policy would lead legitimately to that result. Some of the considerations in favor of the doctrine of general capacities have already been advanced. It remains to determine whether harm would result from the removal of all restraint from the corporate power to contract, — whether, in other words, society would be the loser through the death of the whole law of corporate power and *ultra vires*.

[After commenting upon Judge Thompson's view.] His view may be accepted, however, as an evidence of what is believed to be the general sense of the American world to-day; namely, that society is vastly more interested in the adjustment of the actual relations subsisting between corporations and individuals than in the maintenance of fancied relations between corporations and the State. The fran-

chise to be a corporation is no longer in the hands of favorites of the Crown. (It is no longer true that the owners of this franchise have their brethren at their mercy, or even that they occupy a position of peculiar advantage as compared with them.)

Moreover, it must not be forgotten that, independently of these considerations, it remains true that a dissenting minority of stockholders would still have all the rights of a partner in respect of confining his associates to the enterprise to which he agreed to contribute his capital. This is not a case in which partnership law has drawn upon corporation law for its conception of limitations upon the power of the majority. The reverse has been the case, as may be seen by a consideration of Lord Eldon's decision in *Natusch v. Irving*, Gow on Partnership, App., p. 398, ed. 3.

The observations which have just been made in regard to legislative declarations of policy with respect to particular forms of enterprise are of course applicable to the case of quasi public corporations. Where the nature of the business is such that the public has an interest in the conduct of it, it seems not unreasonable to insist that the business shall be regulated *as a business*, and not with reference to the fact that it is carried on by a corporation.

It must not be forgotten, however, that the latter part of this discussion has been concerned with the *possible* rather than with the *actual* in corporation law. In point of fact, there is a grand division of jurisdictions upon the primary question of public policy outlined above. The Supreme Court of the United States,¹ the Supreme Courts of Massachusetts,² Alabama,³ and a few other States, have declared themselves definitely in favor of maintaining existing restrictions upon the corporate power to contract. They have, in general, refused to enforce unauthorized or prohibited contracts, even in favor of the party who has fully performed. The doctrine is entirely intelligible and consistent, and, in the main, it has been consistently applied. In a few cases, however (as has been seen), there are either dicta or actual decisions which seem to mar the symmetry of the system. If this doctrine becomes obsolete it will be the result, not of any inherent defects of structure, but because it is not in touch with the needs and requirements of the business world. In Pennsylvania,⁴ on the other hand, and in New York,⁵ New Jersey,⁶ Indiana,⁷ Illinois,⁸ Minnesota,⁹ Kansas,¹⁰ and in many other jurisdictions, the courts have

¹ *Central Transportation Co. v. Pullman's Pal. Car Co.*, 139 U. S. 24.

² *Davis v. Old Colony R. R. Co.*, 131 Mass. 258.

³ *Bank v. Dunkin*, 54 Ala. 471.

⁴ *Wright v. Pipe Line Co.*, 101 Pa. 204.

⁵ *Holmes, etc. Mfg. Co. v. Metal Co.*, 127 N. Y. 252.

⁶ *Camden, etc. R. R. Co. v. Mays Landing R. R. Co.*, 48 N. J. L. 530.

⁷ *State Board of Agriculture v. Citizens' R. R. Co.*, 47 Ind. 407.

⁸ *Heims v. Flannery*, 137 Ill. 309. [But see 181 Ill. 35.]

⁹ *Auerbach v. Mill Co.*, 28 Minn. 291.

¹⁰ *Sherman, etc. Town Co. v. Morris*, 43 Kan. 282.

manifested a tendency to give a qualified adherence to the second theory of public policy,—hesitating to ignore altogether the legal restrictions upon corporate power, but refusing to permit the party who has received a benefit to take advantage of the defect of power when a suit is brought to enforce the contract. The position of these courts of the second group is believed by the writer (as has been pointed out above) to be unsound upon principle, unless the theory of general capacities is adopted; and unsound even then unless it is pushed to its legitimate conclusion, with the result of enforcing all corporate contracts, even when they are wholly executory, in every case where a contract between individuals would be enforced. In point of fact, the courts of the second group endeavor, in general, to work out the ends of justice upon the basis of a theory of estoppel. Where a corporation has received a benefit under a contract, it is said to be “estopped” from pleading the fact that the contract was unauthorized (or, in some cases, even that it was prohibited) as a defence to an action brought to enforce the agreement. This view seems to be open, upon principle, to certain serious objections. In most jurisdictions the courts are definitely committed to the position that those who deal with corporations are charged with notice of the limits of corporate power. In contemplation of law, when A makes an unauthorized or prohibited contract with a corporation he does it with his eyes open. He takes the risk attendant upon inability to enforce the agreement in a court of justice. It is accordingly somewhat difficult to manipulate the doctrine of equitable estoppel in his favor, in view of the fact that the act of the corporation was not the inducing cause of his present position. Nor does it help matters much to discard the theory that the chartered powers of a corporation are included in the citizen’s stock of presumptive knowledge. A court must either go further than this, and declare that the public is presumed *not to know* what a corporation may lawfully do, or else the judges must prepare to receive proof in a particular case that the limitations of the charter were in fact brought home to the plaintiff. Of course it may be said, and it sometimes is said, that in these cases the term “estoppel” is not used in its technical sense. If this is true, the use of a scientific term in any other than its technical sense is perhaps open to criticism.

This tendency to work out results upon the basis of a species of primitive estoppel is, however, a tendency which is not without interest. A result more strictly “equitable” might perhaps be reached if the courts were to hold that a corporation, by contracting, warrants its power and right to enter into the agreement. Suppose, for example, that a corporation makes a prohibited contract. In the face of the prohibition the contract will not be specifically enforced. Nor will the plaintiff be permitted to maintain an action upon it. Rights of recovery in quasi contract, however, are not broad enough to meet

the requirements of the case. The corporation will accordingly be treated as having warranted its power and right to make the agreement. The subsequent assertion of a lack of power and right, although theoretically effective so far as disposing of the plaintiff's suit is concerned, now becomes a clear breach of the warranty. The measure of damage in an action for this breach is the value of the contract which the plaintiff has lost. This includes prospective profit and the loss of a bargain. Thus the plaintiff in such a case has every right except the right of specific performance. It goes without saying that such a theory presupposes the abandonment of the view that all the world has notice of the limits of corporate power. It is, of course, a somewhat fanciful theory, but it furnishes an interesting basis for a comparison with the modern German conception of damage by reason of the non-existence of contract, — "the negative interest of contract," as Jhering calls it (*Negatives Vertragsinteresse*).

If we return from the domain of theory to our final survey of existing conditions in American courts, it seems hard to escape a conclusion favorable to the view which results in the enforcement in so many cases of unauthorized and prohibited contracts. Incomplete as it is, this doctrine seems to represent far better than the other the enlightened sense of the business world, and the prediction is hazarded that it is destined in its full development to be the doctrine of the future.

omit to 926.
SECTION IX.

Obligation to restore what was Received under a Contract which has subsequently been Repudiated on the Ground of Ultra Vires.

RE PHOENIX LIFE ASSURANCE COMPANY; BURGES
& STOCK'S CASE.

1862. 2 *Johnson & Hemming*, 441.¹

THE PHOENIX Life Assurance Company was formed under the Joint Stock Companies Act (7 & 8 Vict. c. 110), under a deed of settlement, dated May 5, 1848, in which the business of the company was stated to be life assurance.

In 1858, the company, in accordance with a vote at a general meeting, commenced insuring marine risks. The company issued policies to Messrs. Burges & Stock on various vessels, on some of which losses occurred.

In 1860, an order was made for winding up the company.

Burges & Stock undertook to prove against the company for the amount of their claims on marine policies.

Giffard, Q.C., and *J. Russell*, for Burges & Stock.

Kay, for the creditors' representative.

Fry (*Sir H. Cairns*, Q.C., with him), for the official manager.

SIR W. PAGE WOOD, VICE-CHANCELLOR. [After deciding that the claimants would not be allowed to prove for losses upon marine policies:]

There is one point as to which I reserved my judgment, viz., whether Messrs Burges and Stock are entitled to prove for the amount of the premiums paid by them. It appears from the proceedings that the total amount of premiums received falls far short of the total payments made in respect of the marine business, but this cannot affect the rights of these claimants. They have had no consideration for the premiums they paid. The directors, it is true, had no power to issue marine policies, but they had power to receive money, and apply it for the benefit of the company. It is proved that they did so receive and apply these premiums, and the amount might have been recovered, even at law, as money had and received. The proof must therefore be allowed for the amount of the premiums paid.

¹ Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to a single point. — ED.

BARONESS WENLOCK v. RIVER DEE CO.

1887. *L. R.* 19 *Qu. B. Div.* 155.¹**APPLICATION** to vary the report of a special referee.

The facts were as follows : —

An action had been brought by the plaintiffs, as executors of the late Lord Wenlock, deceased, to recover from the defendants the amount of moneys advanced by the testator to them. The defence set up was in substance that the moneys had been borrowed by the company *ultra vires*. It appeared that the testator had advanced large sums of money to the defendant company. He had also paid off a previous advance of 56,000*l.* from the Rock Insurance Company to the defendants, taking an assignment of that debt and a fresh covenant for repayment to himself by the defendants. The judge at the trial gave judgment for the plaintiffs for the full amount of the advances by the testator to the defendants. Upon appeal the Court of Appeal varied his judgment, and, by order dated May 9, 1883, ordered that judgment should be entered for the plaintiffs for the amount of 25,000*l.* (that sum being the full amount which the company had power to borrow) and interest, and also that in addition thereto the plaintiffs should recover judgment for so much and so much only of the sums advanced as was employed in payment of any debts or liabilities of the company properly payable by them, and interest from the respective dates of such employment, and that it should be referred to a special referee to inquire as to and report the amount of the interest payable on the said sum of 25,000*l.* as aforesaid, and the amount of the parts of the said sums so employed as aforesaid and the interest thereon. On appeal to the House of Lords they affirmed the decision of the Court of Appeal.² The special referee held an inquiry under the above order, upon which inquiry counsel were heard and witnesses examined, and he thereupon made a report. The plaintiffs now applied to the Court of Appeal to decide certain questions of law raised by such report and to vary the report in certain respects, and there was a cross application to vary such report by the defendants. Various questions arose on the report with regard to items allowed or disallowed by the referee, which the plaintiffs claimed to have allowed under the order of May 9, 1883, but which the defendants contended should be disallowed.

The questions raised were briefly as follows : —

In addition to the portions of the moneys advanced which had been applied to the payment of debts or liabilities of the company existing at the time of the respective advances the referee allowed, subject to the opinion of the Court, items in respect of portions of the moneys

¹ Statement abridged. Portions of arguments and opinion omitted. — *Ed.*² 10 App. Cas. 354.

advanced which had been applied in payment of debts and liabilities of the company which arose subsequently to the respective advances, whereas the defendants contended that he should have disallowed such items and allowed only items in respect of moneys advanced which had been applied in payment of debts and liabilities existing at the date of the advances.

[Omitting certain questions.]

The plaintiffs further claimed to be allowed under the order, in addition to the 25,000*l.* for which they had judgment as being validly borrowed, the amount of all debts and liabilities of the company paid out of that sum of 25,000*l.*

[After a preliminary objection to the application had been argued and disallowed, the main questions were argued.]

Rigby, Q.C., and *R. O. B. Lane*, for the plaintiffs. The terms of the order of May 9, 1883, include all debts or liabilities of the company paid out of the advances of the plaintiffs' testator whether existing at the date of the advances or not. The doctrine of equity by which the lender or quasi-lender of money borrowed by a company *ultra vires* is subrogated to the rights of a creditor of the company whose debt has been paid off out of the money so borrowed is not confined to cases where the debt was in existence at the time of the advance, but applies to all debts and liabilities of the company paid off out of the money so borrowed whether accruing before or after the advance. The principle upon which this equity depends is discussed in the case of *Blackburn Building Society v. Cunliffe, Brooks & Co.*,¹ and in the judgments in that case there is no trace of the limitation of the doctrine suggested by the defendants. If the company have had the benefit of the money so advanced by its application to debts or liabilities validly incurred by the company and which they were bound to meet, the person who has advanced the money is then subrogated to the rights of the creditors so paid off. The principle is that equity will follow the money, which remains in equity the property of the quasi-lender, and wherever it can find any security or piece of property representing the money, the quasi-lender is entitled thereto: and therefore, so far as the money has been applied for the benefit of the company, it is to be treated in equity as existing in the coffers of the company and must be repaid, not as money borrowed, but as money which still belongs in equity to the lender. The test is whether the transaction has added to the liabilities of the company, and, so far as the advance has been applied to debts or liabilities which the company has validly incurred, whether before or after the advance, the company's liability is not increased.

[Remainder of argument omitted.]

Sir Horace Davey, Q.C., and *A. R. Kirby* for the defendants. The order of May 9, 1883, must be construed with reference to what the Court may consider to be the correct doctrine of equity as to subrogation in such cases. It is contended that the view of the doctrine on

¹ 22 Ch. D. 61; also 9 App. Cas. 857, not on this point.

the subject contended for on behalf of the plaintiffs is far too wide and sweeping. The argument for the plaintiffs amounts to this: viz., that the rule which forbids borrowing money ultra vires is practically abrogated wherever it can be shewn that money so borrowed was applied to the purposes of the corporation, that is to say, that as between the directors and the shareholders it was not misapplied. The doctrine of *Blackburn Benefit Building Society v. Cunliffe, Brooks & Co.*¹ only applies to debts and liabilities existing at the time of the advance which have been satisfied out of it. So far as such debts and liabilities are concerned, it is clear that there has been no increase of the liability of the company. It is merely a substitution of one creditor for another. Altogether different considerations arise when the money borrowed is applied to payment of a liability subsequently incurred and which might never have been incurred if the money had not been borrowed. The extension of the equitable doctrine now sought to be made would have the most dangerous effects, as enabling companies practically to borrow without limit.

[LORD ESHER, M.R. But even if the doctrine be limited to debts previously incurred, the company have only to postpone the borrowing until after they have incurred the liability.]

The true principle is, that there is supposed to have been an assignment of the debt paid out of the advance to the person making the advance; that the quasi-lender really pays his money to the creditor and takes an assignment from him of the debt; but that supposed assignment is only applicable to the case of debts in existence at the time of the advance. In the previous cases on the subject the question arose with regard to existing debts.

It is clear that the plaintiffs' contention as to the debts paid out of the 25,000*l.* validly borrowed cannot be right, for the plaintiffs would be getting the same thing twice over if it were; and the terms of the order rightly construed exclude such contention. The money being validly borrowed was, when it got into the defendants' hands, the defendants' own money, and the equity to subrogation to the rights of the creditor cannot apply, for it depends on the doctrine that equity will treat the money borrowed as still remaining the quasi-lender's property, which only applies when the money is borrowed ultra vires.

Cur. adv. vult.

The judgment of the Court (Lord Esher, M.R., Fry, and Lopes, L.JJ.) was delivered by FRY, L.J. The questions which now require determination in this case arise from the application of the order of this Court of May 9, 1883, to the facts as found by Mr. Robinson, the special referee named in the order.

By that order it was directed that judgment should be entered for 25,000*l.* and interest, and in addition thereto for so much and so much

¹ 22 Ch. D. 61.

only of the sums advanced to the defendant company by the Rock Life Assurance Company and Baron Wenlock as was employed in the payment of any debts or liabilities of the defendant company properly payable by them, with interest from the respective dates of such employment. It appears that some of the moneys were applied in payment of debts and liabilities properly payable by the company at the date of the advances, and some in payment of debts and liabilities which arose or became properly payable at dates subsequent to the advances. The defendants contend that only the advances employed in payment of debts and liabilities actually payable at the date of the advance can be brought within the operation of the direction in the order. The plaintiffs contend that all these advances are within the direction, and that the date of the accruer of the liability is immaterial. We are of opinion that the plaintiffs' contention ought to prevail. We are not at liberty to travel beyond or review the declaration contained in the order of May 9, 1883, which is binding on us not only as a decision of this Court but by reason of its affirmation by the House of Lords: and in our opinion the order rightly bears the wider construction. It is silent as to any limit of time within which the liabilities are to accrue, or within which they are to be paid: and by fixing the respective dates of the employment of the sums as the periods of time from which interest is to run, it seems to indicate that the date of the employment and not of the advance is the material one. If the Court had intended any such limitation of the inquiry as that now contended for by the defendants, we think that it would have found expression, if not in the formal order, at any rate in the oral judgments, but we can find no trace of it.

But we go further and say that in our judgment the equity in question knows of no such limitation as that suggested. This equity is based on a fiction, which, like all legal fictions, has been invented with a view to the furtherance of justice. The Court closes its eyes to the true facts of the case, viz., an advance as a loan by the quasi-lender to the company, and a payment by the company to its creditors as out of its own moneys: and assumes on the contrary that the quasi-lender and the creditor of the company met together and that the former advanced to the latter the amount of his claim against the company and took an assignment of that claim for his own benefit. There is no reason that we can find for supposing that this imaginary transaction between the quasi-lender and the creditor was confined to the day and hour of the advance of the money to the company: in the coffers of the company the money really advanced as a loan is still thought of by the Court as the money of the quasi-lender: and the Court, as the author of the benevolent fiction on which it acts, can fix its own time and place for the enactment of the supposed bargain between the two parties who have met and contracted together only in the imagination of the Court. The true limit of the doctrine we conceive to be stated by Lord Selborne, L.C., in delivering the judgment of this Court in the

case of the *Blackburn Building Society v. Cunliffe, Brooks & Co.*:¹ "The test," said he, "is, has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is merely for the convenience of payment a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity: and, if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing." Now the payment of bonâ fide liabilities arising or accruing subsequently to the actual date of the advance has in no way really added to the liabilities of the company and therefore in no way transgresses the boundaries of the doctrine as laid down by this Court in the case to which we have referred. Sir Horace Davey forcibly warned us of the danger of the proposition which we have laid down, and said that it would afford to companies a facile means of evading the limit of their borrowing powers. But the danger appears to us imaginary. We do not think that capitalists will be found knowingly and willingly to advance money in the hope of recovering it on the ground of some future subrogation to the future rights of some future creditor. The doctrine has rarely, if ever, done more for any one than snatch a few brands from the burning. In the present case the utmost extension of the doctrine will leave the plaintiffs heavy losers.

It is conceded that under the order of May 9, 1883, the plaintiffs are entitled to the 25,000*l.* and to so much of the sums advanced beyond the 25,000*l.* as was expended in satisfaction of the debts and liabilities of the company. The plaintiffs contend that they are entitled, in addition to all this, to so much of the 25,000*l.* itself as was so expended. They contend that this was given to them by the express terms of the order, and that the point, therefore, is not open to further consideration. We do not so read the order; for it appears to us that the 25,000*l.* is dealt with separately, in the first place, and that the rest of the order deals with sums in every respect outside of and beyond the 25,000*l.* The words in the order "in addition" exclude, in our opinion, all further consideration both of the borrowing of the 25,000*l.* and of its application. And in our opinion this is right in point of reason and principle: for the 25,000*l.* having been validly borrowed became part of the moneys of the company as much as the original

¹ 22 Ch. D. 61, at p. 71.

subscriptions of the members or the produce of sales of its lands: and no application by the company of its own moneys to the payment of its own debts can be conceived of as a transaction between a quasi-lender to the company and the creditors of the company, or lead to a subrogation of the creditors' rights to the stranger. If the plaintiffs were to be subrogated to the rights of those creditors who were paid with the 25,000*l.*, we do not see why they should not be subrogated to the rights of every creditor paid by the company with its own moneys from any source whatever.

[The matter was sent back to the referee with various declarations in accordance with the principles laid down in the foregoing opinion.]

IN RE NATIONAL, &c. BUILDING SOCIETY.

EX PARTE WILLIAMSON.

1869. *L. R. 5 Chancery Appeals*, 309.¹

THIS was a motion made by special leave of the Court of Appeal to discharge an order of the Master of the Rolls, whereby the *National Permanent Benefit Building Society* was ordered to be wound up.

The company was formed under the *Benefit Societies Act*, 6 & 7 Will. 4, c. 32, and commenced business in February, 1865.

The principal object of the company, as stated in the affidavit of Mr. *W. Richardson*, the secretary, was to provide a safe mode of investment for the funds of another society, called the *National Savings Bank Association*.

The rules contained the usual provisions for advancing money to members who held shares, and also contained powers of investing money in the hands of the directors; but there was no power to borrow money.

The prospectus, which was issued after the rules had been certified, contained the following announcement: "The directors have made arrangements to borrow sums to be advanced to such members as desire to receive an advance before the time for it regularly arrives, such members of course paying interest on the sums lent, until their turn arrives."

In September, 1865, the *Building Society* borrowed £400 from the *Savings Bank Association*, which was forthwith advanced by the directors of the *Building Society* to a member on mortgage security; and the mortgage deed was deposited with the *Savings Bank*, and the contributions of the member paid into the *Savings Bank*. In

¹ Arguments omitted. — ED.

January, 1866, the *Building Society* borrowed a further sum of £900, which was applied in advances to members, and secured in like manner. Shortly afterwards the *Savings Bank* stopped payment, at which time they had advanced £1300 to the *Building Society*. The *Savings Bank Association* was subsequently ordered to be wound up.

On the 13th of July, 1867, the Master of the Rolls made an order to wind up the *Building Society* as an unregistered company under Part 8 of the *Companies Act*, 1862. The order was made on the Petition of the official liquidator of the *Savings Bank Association*, who claimed to be a creditor for £1300 due to that Association.

A proof for that sum was afterwards admitted against the estate of the *Building Society*, and an order for a call was made upon the contributories for payment of it. From this order *J. W. Williamson* and others, who had been settled on the list of contributories, appealed.

When the appeal was opened before the Lord Justice Giffard it appeared that there was no debt due from the *Building Society* except the £1300 on which the winding-up Petition was founded; and as the ground of the appeal was that this debt was invalid, the Lord Justice directed notice of motion to be given to discharge the winding-up order. This having been done, the two applications came on together.

The principal promoters of the *Building Society* were also promoters of the *Savings Bank Association*, and *J. W. Williamson* and some others of the Appellants were directors or otherwise office bearers in both companies.

Roxburgh, Q. C., and *Cottrell*, for appellants.

Sir *R. Baggallay*, Q. C., and *Higgins*, for official liquidator.

SIR G. M. GIFFARD, L.J. In point of form this is an appeal from an order of the Master of the Rolls, but in reality the point on which I am about to determine this case was never brought fairly, or argued, before him, and therefore the matter is very similar to an original hearing before me.

The case, when it is examined, is a perfectly simple one, but before I go into it I will dispose of what Sir *Richard Baggallay* said as to the parties who are making this application, and as to the delay. I quite agree that in many cases delay may be of very great importance, especially if it has been shown that there have been sales of property or other dealings. I do not find in this case that anything of that description has taken place. Then, as regards parties, the nature of the case is such that I do not consider these parties personally disabled from bringing forward the case, more especially as they are not the only contributories on the list, they being about nine out of a number of thirty-six. But, although I think the winding-up order ought not to have been made, I certainly shall give them no costs. *

The matter itself is a very simple one. This company is what is called a benefit building society. Until the recent decision of the Court in *Laing v. Reed*,¹ it was doubted whether, even if you put a

¹ Law Rep. 5 Ch. 4.

limited borrowing power among the rules of a society of this sort, that particular rule would be legal. But, what we have here is a limited benefit building society without any power to borrow, and the rules and very nature of that society shew that it would be contrary to its constitution to borrow money so as to bind the company, or to make the individual members of the company, as members, liable for borrowing money; because the whole constitution of the society is that the members are to make certain monthly payments, and in consideration of these monthly payments and the fines provided by the rules they are to receive certain loans.

After the rules had been certified and published, and the nature of the company had been fixed, a prospectus was issued, and by that prospectus the directors chose to say "that they have made arrangements to borrow sums to be advanced to such members as desire to receive an advance before their turn for it regularly arrives, such members of course paying interest on the sum lent until their turn arrives." If we look at the nature of the company, that can only amount to this: that the directors have chosen to pledge their personal liability. It is not a statement that the company were liable, or that any person who was a member of the company was at all bound or was personally made liable in respect of any debt of the company.

This being so, let us see on what ground this winding-up order was made. It was made upon the Petition of a creditor, and in order to support that Petition the Petitioner must have made out that he was a creditor, either legal or equitable — either character would be sufficient. I have already said that this benefit building society could not incur a debt by borrowing money upon loan. Indeed, the contrary has hardly been argued. It could not do so any more than a mining company or any other of the companies which have not authority or power to bind their members by borrowing money. There was no legal debt, and if no legal debt, the next thing to inquire is, whether there was an equitable debt? A class of cases has been referred to on that subject, the principal of which are *In re German Mining Company*¹ and *In re Cork and Youghal Railway Company*,² the latter of which was before the Lord Chancellor and myself a short time ago; I have no hesitation in saying that those cases have gone quite far enough, and that I am not disposed to extend them. They were decided upon a principle, recognized in old cases, beginning with *Marlow v. Pitfield*,³ where there was a loan to an infant, and the money was spent in paying for necessaries, and in another case of a more modern date, where there was money actually lent to a lunatic, and it went in paying expenses which were necessary for the lunatic. In such cases it has been held, that although the party lending the money could maintain no action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a Court of Equity and stand in the place of those creditors whose debts had been so paid. That is the principle of those

¹ 4 D. M. & G. 19.

² Law Rep. 4 Ch. 748.

³ 1 P. Wms. 558.

cases. It is a very clear and definite principle, and a principle which ought not to be departed from.

Then it is said that the present case is brought within that principle. I do not think it necessary to go through the evidence. Suffice it to say, that there is no proof whatever that one sixpence of this money went in payment of any debt which was recoverable against the company. In truth, all this money went for the purpose of loans to members of this company. It is not for me to say whether the *Savings Bank Association* that lent the money have or have not any right, either as against the property of this company, which was pledged to them, or as against the persons to whom this money was lent. If they have any such rights, they can only be asserted by filing a bill and taking a very different proceeding from that which has been taken here.

I am, therefore, of opinion that there is no legal or equitable debt. The winding-up Petition is in the nature of an execution against the company. Whether the parties may or may not themselves be personally liable, or however much I may disapprove of their conduct, they are not to be precluded from shewing that the title of the creditor to sustain a winding-up Petition totally fails, as it does in this case. The consequence is, that the winding-up order, the proof of the debt, and the order for the call must all be discharged. But, as I said before, the conduct of these parties has been such as to disentitle them to any costs.

IN RE WREXHAM, &c. R. CO.

1899. *Law Reports* (1899), 1 *Chancery*, 440.¹

APPEAL against two decisions of Romer, J.²

The above railway company had power to borrow money by the creation of three classes of debenture stock, A, B, and C, to the extent of 175,000*l.* by A stock, 175,000*l.* by B stock, and 145,000*l.* by C stock. The A stock had priority as to both principal and interest over the B and C stocks, and the B stock had a similar priority over the C stock. In July, 1897, these borrowing powers were exhausted, the whole of the three classes of debenture stock having been created, and the company had no further power to borrow money. The company had not any funds to enable them to pay the half-year's interest which was about to become due on August 1 on the debenture stocks, and they applied to their bankers, the North and South Wales Bank,

¹ Arguments omitted; also the greater part of the opinions. — Ed.

² [1898] 2 Ch. 663; [1899] 1 Ch. 205.

to advance them money for the purpose. This the bank consented to do, and the advance was made by their paying the interest-warrants to the stockholders when they presented them for payment. The total sum thus applied was 9672*l.*, of which 3850*l.* went to pay the interest due to the holders of A debenture stock, 3380*l.* to pay the interest on the B stock, and the residue to pay the interest on the C stock. On September 8, 1897, upon a petition under the Railway Companies Act, 1867, presented by the Great Central Railway Company, who were judgment creditors of the Wrexham Company, an order for the appointment of a receiver was made against that company. The receiver had in his hands enough money to pay a half-year's interest to the A stockholders and to leave some surplus for the B stockholders. The bank claimed, in the first instance, that, to the extent of the whole 9672*l.* which they had paid to the debenture stockholders, they should be subrogated to the rights of those stockholders, and should, out of any moneys in the hands of the receiver, be paid what they had advanced in priority to any payment to the debenture stockholders. Romer, J., held that this claim was unfounded. The bank then claimed that, at any rate to the extent of the 3850*l.* paid to the A stockholders, they were entitled to stand in the shoes of those stockholders and to be paid in priority to any payment to the B and C stockholders out of any surplus remaining after paying the interest due to the A stockholders. Romer, J., decided against this claim also. The bank appealed against both decisions.

Neville, Q. C., Methold, and Danckwerts, for appellants.

F. Thompson, Theobald, Mark Romer, and R. J. Parker, for various parties.

LINDLEY, M. R. Agreeing as I do with Romer, J., and with the judgments which my brothers have prepared, and which I have read, I should say nothing more, if it were not that I think I ought to express my dissent from the observations of Fry, L. J., on which the appellants base their contention. The decision of the Court in *Baroness Wenlock v. River Dee Co.*, 19 Q. B. D. 155, was quite right, and the judgment in it is very valuable. Fry, L. J., who delivered it, was the last person to shut his eyes and not get at the real facts and substance of any case before him. But in dealing with that case he says (19 Q. B. D. 165) that "the court closes its eyes to the true facts of the case." I cannot help thinking that this is incorrect. A prohibition against borrowing more than a given sum is only in reality and substance disobeyed when an obligation to pay more than that sum is contracted. Courts of equity have always looked into the facts to see whether the prohibition has been really disobeyed or not. If it is disobeyed, and to the extent to which it is disobeyed, the prohibition is enforced. But, if the facts when ascertained shew that in truth it has not been disobeyed, an advance of money is treated as not prohibited, although it may at first sight appear to be so because it is beyond the limited amount. The application of the money bor-

rowed shews whether the obligations of the borrowing company have been increased or not, and the extent, if any, to which they have been increased. So far as the money has been applied in discharging debts or liabilities which could be enforced against the company, the prohibition against borrowing does not apply to it, and the courts have so decided. The subrogation theory has been had recourse to in order to account for the decisions ultimately arrived at ; but that theory was really not wanted in order to justify them. It was, however, adequate for the purposes for which it was used, and as applied to the cases before the courts it led to just results. But, if logically followed out in other cases, it leads to consequences not only not foreseen by those who had recourse to it, but to results so startling that I cannot accept the theory as sound. There is no decision yet in which it has been applied so as to defeat any innocent person, nor so as to place the lender in a better position than that in which he would have been if his loan had not been prohibited. But that would be the result in the present case, if we adopted that theory and pushed it to its logical consequences, as the appellants contended we ought to do. The Legislature (30 & 31 Vict. c. 127, s. 26) has recognised and partially acted upon the true principle in enacting that money borrowed by a company for the purpose of paying off, and duly applied in paying off, existing statutory mortgages or bonds of the company shall, so far as the same is so applied, be deemed money borrowed within, and not in excess of, the company's statutory powers. This principle obviously cannot in reason be confined to statutory bonds or mortgages ; and courts of equity have acted upon the principle, and have not confined its application within arbitrary limits, but have enforced it more widely than the Legislature, in order to prevent great injustice. They have done so, however, not by closing their eyes to the real facts and acting on a fiction, but by diligently ascertaining the real truth, and by attending to the real substance of each case. Even if the fiction of subrogation were correct, the maxim "*In fitione juris semper existit æquitas*" would prevent its application to the present case.

RIGBY, L. J. [After stating the case and reviewing the authorities.]

I think that the great preponderance of authority shews that the doctrine of subrogation has very little, if anything at all, to do with the equity really enforced in the cases, and that there is, at any rate, no authority for any subrogation to the securities or priorities of the creditors paid off. Dealing with this case independently of the authorities, I see no reason why the parties to an illegal lending should have anything more than bare justice dealt out to them ; and this they get if they are allowed, as they have hitherto been allowed, to have that portion of the advance actually expended in payment of debts of the company treated as a valid advance. If the advance had been within the borrowing powers of the company, the bank could have had no right to the securities or priorities of the creditors paid off. It seems to me that it would be unjust to other creditors that a fiction

should be invented for the purpose of making an invalid loan more valuable than a valid one. I entirely agree with what Romer, J., said about the unsatisfactory way in which such a doctrine as is contended for by the appellants would work in practice, and I do not consider it necessary to repeat it.

[The opinion of VAUGHAN WILLIAMS, L. J., is omitted.]

MORVILLE v. AMERICAN TRACT SOCIETY.

1877. 123 *Massachusetts*, 129.¹

COLT, J. The plaintiff paid five thousand dollars to the American Tract Society, under an agreement with the treasurer of that society that it should be repaid to him in case the society should not be allowed to retain its catholic condition, and unless fifty thousand dollars be raised within five years for evangelization purposes. A receipt for the money, signed by the treasurer, and reciting that agreement, was given to the plaintiff. There was a failure of one of the conditions named, but the society refused to pay the money back to the plaintiff.

The right of the plaintiff to recover the money so given was submitted by the parties to three arbitrators, by a submission entered into before a justice of the peace under the Gen. Sts. c. 147. An award in favor of the plaintiff was duly returned to the Superior Court, and many objections were there made by the defendant to its acceptance. It is necessary to consider only those which were relied on at the argument.

1. The defendant insisted that the contract made with the plaintiff and the submission to arbitration of the claims arising under it, were not within the chartered powers of the society.

[The learned Judge held, that the contract was *intra vires*. After expressing this view, the opinion proceeds as follows:]

There is another answer to this objection which is equally satisfactory. The question is upon the acceptance of the award; no question of pleading is involved. The award is binding, if in any form of action the plaintiff is entitled to recover. If the defendant were to be allowed the full benefit of the point made, the plaintiff could only be prevented from enforcing his express contract. The money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought now to pay over, and which may be recovered in an action for money had and received. The illegality is not that which

¹ Statement and argument omitted. Only so much of the opinion is given as relates to a single point. — Ed.

arises when the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself is chargeable with no illegal act, and the corporation is the only one at fault in exceeding its corporate powers by making the express contract. The plaintiff is not seeking to enforce that contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which must be regarded as a necessary affirmation of an illegal act.

The right to recover the money upon the implied promise, under like circumstances, has been heretofore recognized by this court.

In *White v. Franklin Bank*, 22 Pick. 181, where an express contract was made by a bank for the payment of a deposit at a future day certain, against the prohibition of the Rev. Sts. c. 36, § 57, it was held that, while no action could be maintained by the depositor upon the express contract, yet he might recover back the money, without a previous demand, in an action commenced before the expiration of the time, the parties not being *in pari delicto*, and the action being in disaffirmance of the illegal contract. The general proposition, that where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, it may be recovered back, was laid down in that case by Wilde, J., who declared it to be, not only consonant with principles of sound policy and justice, but to have been now settled by authority, whatever doubt may have been formerly entertained. "To decide," he adds, "that this action cannot be maintained, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute, by taking advantage of the unwary, and of those who may have no actual knowledge of the existence of the prohibition."

Again, in *Dill v. Wareham*, 7 Met. 438, where a town made a contract with reference to certain fisheries within its limits which it had no authority to make, and which it refused to perform, it was decided that the plaintiff might recover back money paid in advance on the contract, as money had and received by the town to his use.

The same principle is recognized in New York. *Utica Ins. Co. v. Scott*, 19 Johns. 1. *Utica Ins. Co. v. Cadwell*, 3 Wend. 296. *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652.

[Remainder of opinion omitted.]

Exceptions overruled.

NORTHWESTERN UNION PACKET CO. v. SHAW.

1875. 37 *Wisconsin*, 655.¹**A**PPEAL from the Circuit Court.

The complaint alleges that plaintiff entered into a contract with the defendant to purchase of the latter 4,000 bushels of wheat, to be delivered from the mill of the defendant into the barge of the plaintiff immediately; that plaintiff paid the defendant \$1,000 on account of such purchase; that plaintiff furnished a suitable barge on the day the contract was made, but that defendant, though requested, failed to deliver the wheat or to repay the \$1,000 so advanced. The complaint also avers that the barge was detained for several days, and that the market price of wheat advanced immediately after the contract was made. Plaintiff seeks to recover: 1. The \$1,000 paid on account of the contract; 2. Damages for the breach of contract by the defendant; 3. Compensation for the value of the use of the barge while so detained.

Defendant's answer admits the making of the contract, the payment of the \$1,000, and the non-delivery of the wheat. The answer also alleges that it was the fault of the plaintiff that the wheat was not delivered; and contains a counterclaim for damages suffered by defendant by reason of the failure of plaintiff to perform the contract on its part.

The articles of incorporation of the plaintiff company contemplated that the business of the company should be confined to that of a common carrier of persons and property.

On the trial the circuit judge held that the plaintiff had no power to make the contract declared on, and the jury, under his direction, found for defendant. Judgment was entered on the verdict, and plaintiff appealed.

Cameron & Losey, for appellant.

Wing & Prentiss, for respondent.

LYON, J. [After discussing the question whether the contract was *ultra vires* on the part of the plaintiff.]

We conclude that the contract set forth in the pleadings, as to the plaintiff, is *ultra vires*, and that no claim for damages resulting from a breach thereof can be successfully asserted by either party. This disposes of the counterclaim of the defendant, and of all claims of the plaintiff except the claim to recover the \$1,000 paid on account of the attempted purchase of the wheat.

But the question remains whether the plaintiff is entitled to recover the \$1,000. If it can recover it, no good reason is perceived why it may not do so in this action. The complaint states all the facts essen-

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

tial to be averred in an action to recover the same, except that the plaintiff had no power to make the contract, and that omission may be supplied by amendment. Such an amendment cannot prejudice the defendant, for, in the progress of the case thus far, he has constantly asserted such want of power as a defense.

An extended discussion of the question will not be profitable. There are many adjudications in this country and in England, bearing upon it, some of which are cited in the brief of counsel for the plaintiff. The cases have been carefully examined, and we think the rule may fairly be deduced from them, that when money has been paid upon an executory agreement, which is free from moral turpitude, and is not prohibited by positive law, but which is invalid by reason of the legal incapacity of a party thereto, otherwise capable of contracting, to enter into that particular agreement, or for want of compliance with some formal requirement of the law (as that the contract shall be in writing, and the like), the money so paid may, while the agreement remains executory, be recovered back by the party paying it, in an action for money had and received.

Many of the cases go farther, and sustain the action when some of the foregoing conditions are wanting. But the exigencies of this case do not require us to determine how far the rule may be extended, or what conditions may be omitted therefrom without defeating the action. The rule is here stated most favorably for the defendant; and yet it is clear that under it the plaintiff may maintain an action to recover the money paid on the invalid agreement. A contract to buy wheat is an innocent one; no statute has prohibited it; and this particular agreement is invalid only because of the accident, that the purchaser is a corporation instead of a natural person, and happens to lack authority to make this particular contract.

In addition to the cases on this subject cited by counsel, the following will be found to sustain the views above expressed: *Bagott v. Orr*, 2 Bos. & Pul., 472; *Lowry v. Bourdieu*, Doug., 468; *Aubert v. Walsh*, 3 Taunt., 277; *Busk v. Walsh*, 4 id., 290. In *Thomas v. Sowards*, 25 Wis. 631, the rule above stated was applied. See also *Brandeis v. Neustadt*, 13 id., 142. But it is argued by the learned counsel for the defendant, that the case of *The M., W. & M. P. R. Co. v. The W. & P. P. R. Co.*, 7 Wis. 59, is an authority fatal to the plaintiff's right to recover. That was a mortgage given to secure the performance of an agreement which the court held to be *ultra vires*. It was, as Chief Justice WHITON said in the opinion, an action founded on the agreement and on it alone. The contract failing, the action failed as a matter of course. In strict obedience to the authority of that decision, we hold in this case, that so far as the action is founded on the void agreement, it cannot be maintained. Had that been simply an action to recover the amount paid by the plaintiff for the use of the defendant, it might have been decided differently. But it was not such an action, and the court did not determine whether such an action could be main-

tained. The case is not, therefore, an authority against the plaintiff's right to recover his advances on account of the void executory agreement.

By the Court. — The judgment of the circuit court is reversed, and the cause remanded for a new trial.

A motion for rehearing was denied.

SECTION X.

*Liability of Corporator where there is Crime, Tort, or Ultra Vires Contract on the Part of the Corporation.*¹

BRUNDRED v. RICE.

1892. 49 *Ohio State*, 640.²

ERROR to Circuit Court.

Rice sued Brundred for money claimed to have been unlawfully exacted of him by the Cleveland and Marietta R. R. Co., as freight, on crude petroleum. The action was treated by both sides as an action of assumpsit for money had and received. It appeared that there was an agreement entered into between the R. R. Co. and Brundred *et als.*, that the R. R. Co. should charge all shippers of oil a certain rate, and should pay over to Brundred *et als.* (who were themselves shippers of oil) one half the freight so charged and collected. It also appeared that, soon after the making of the above agreement, a corporation styled the Ohio Transit Co. was organized under the laws of Ohio; and became, by assignment, a party to the above agreement, nominally acquiring all the rights of Brundred *et als.* thereunder.

Rice contended that Brundred *et als.* were the promoters of the Ohio Transit Co., caused it to be organized, and became and have always been its principal stockholders and its managing officers; and that they caused the Ohio Transit Co. to become a party (by assignment) to the above agreement for the purpose of carrying out their unlawful designs, and made use of said Transit Co., through their control of the same as its officers, to accomplish their unlawful purposes.

The defendants in their answer, among other things, set up that the Ohio Transit Company was a corporation duly organized under the laws of Ohio, and that they could not be charged with moneys received by it, on the ground set forth in the petition. But the court charged the jury that, "if you find by the greater weight of the evidence, that the assignment of the contract was a mere form; that the intention of the defendants in organizing this corporation was to make it a mere agency to receive this money, to be distributed to them under the contract, and according to their right in it as if there had been no assignment; the mere agent, I say, to hold the money for their benefit, why then, a payment to the corporation, under those circumstances, is a payment to

¹ See a later chapter as to statutory individual liability of stockholder for debts of corporation. — Ed.

² Statement abridged. Arguments omitted. — Ed.

them; and the plaintiff would have a right to recover as if it had been put in their hands."

Rice recovered \$1,823.75. The judgment was affirmed by the Circuit Court. Brundred *et als.* brought error.

Nye & Oldham, for plaintiffs in error.

A. D. Follett, W. B. Loomis, and E. B. Kinkead, for defendant in error.

BY THE COURT. [After deciding that the agreement between the R. R. Co. and Brundred *et als.* was against public policy; and that the shipper, on discovering the facts, might maintain an action against the party to whom the money had been paid over by the R. R. Co.]

It is claimed that the interposition of The Ohio Transit Company, an incorporation under the laws of Ohio, organized for the purpose of transporting petroleum through tubing and pipes, precludes a recovery against the defendants. If it had, in good faith, been organized for such purpose, there is no doubt but that the receipt of the money by it under the agreement, would constitute a defense to the action against the defendants. If, however, it was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense. The court fairly submitted this question to the jury, and in finding their verdict for the plaintiff, must have found the facts to be as averred in the petition. It is a stern but just maxim of the law, that fraud vitiates everything into which it enters. Deeds and records made in the most solemn form are set aside and held for naught when shown to have been effectuated for the purpose of fraud; and there is nothing so sacred in a certificate of incorporation as to take it out of the reach of this maxim.

Judgment affirmed.

LA SOCIETE ANONYME DES ANCIENS ETABLISSEMENTS
PANHARD ET LEVASSOR v. PANHARD LEVASSOR MO-
TOR COMPANY, LIMITED.

1901. *Law Reports* (1901), 2 *Chancery*, 513.¹

WITNESS ACTION [before FARWELL, J.].

The plaintiffs were a French company founded in 1897 and carrying on business in Paris as motor-car manufacturers in succession to the former firm of Panhard et Levassor. They had no agency in England at the time the action was brought, as many of their motors had embodied inventions covered by English patents held by the British Motor Company, Limited, who had granted a license to the Motor Manufacturing Company, Limited, with power to grant sub-

¹ Only part of the report is given. — Ed.

licenses. The plaintiffs held no license, but their motors had been frequently imported into England, either by the British Motor Company, Limited, or by private purchasers, who as a rule obtained the requisite license, and the evidence shewed that the words "Panhard" or "Panhard Levassor," when used in the English market, denoted motors of the plaintiffs' manufacture.

The defendants were the Panhard Levassor Motor Company, Limited, registered March 29, 1900, with a capital of 100% divided into 100 shares of 1% each, and the seven signatories to the memorandum of association, who each held one share. The principal objects of the defendant company were the manufacture and sale of motor-cars. The signatories, none of whom bore the name of Panhard or Levassor, were the only shareholders and directors, and the defendant company had not commenced to carry on business.

The plaintiffs alleged that the signatories had wrongfully and fraudulently, and with intent to injure the plaintiffs in their said business, conspired together to form, and had formed, and procured the defendant company to be registered, that the English public would be led to believe that the defendant company were selling the plaintiffs' goods, and that the plaintiffs would be prevented from registering themselves or their agents as a company in England under their own name or a name similar thereto.

The plaintiffs claimed (1.) an injunction to restrain the defendant company and the signatories from using the names of Panhard and Levassor or either of them, or any title or description including those names or either of them, or otherwise colorably resembling the name of the plaintiffs, in connection with the manufacture or sale of motor-cars; (2.) an injunction to restrain the signatories from allowing the defendant company to remain registered under its present name or any such title or description as aforesaid; (3.) damages.

Moulton, K. C., A. J. Walter, J. F. Iselin, and H. F. Moulton, for plaintiffs.

Uppjohn, K. C., and Stewart Smith, for defendants.

The defendants have merely registered their company with the *bonâ fide* object of preventing the plaintiffs registering a company here in their own name. They have no intention of passing off their goods as those of the plaintiffs, and are quite willing to advertise the fact that they have no connection with the plaintiffs. Apart from fraud, no injunction can be granted. *Burgess v. Burgess*, 3 D. M. & G. 896.

[FARWELL, J. The defendants either mean to steal the plaintiffs' business or to prevent them having any in England. They are wrong on either alternative.]

Again, no relief ought to be granted against the signatories, who have merely signed the memorandum.

[FARWELL, J. Could the highwaymen in *Everet v. Williams*, cited in Lindley on Partnership, 6th ed. p. 101,¹ have escaped liability by forming themselves into a limited company?]

At all events the second injunction ought not to be granted. The signatories have no power to remove their company's name from the register.

[FARWELL, J. They can wind up the company or change its name with the approval of the Board of Trade under s. 13 of the Companies Act, 1862 (25 & 26 Vict. s. 89).]

No order to that effect can be made in this action.

FARWELL, J.

The only part of the case which has caused me a little difficulty is the claim against the seven signatories to the memorandum, who are the directors and sole shareholders of the company. The allegation is that they have fraudulently and wrongfully, and with intent to injure the plaintiffs in their said business, conspired together to form, and have formed, and procured the defendant company to be registered. Now, as I hold that the defendant company has the fraudulent intention of annexing the benefit of the plaintiff's name, it follows that the persons who have formed that company and caused it to be registered are guilty in the eye of this Court of a fraudulent conspiracy to carry into effect that which the company, an entity without body or soul, has attempted to do, and are liable in damages accordingly. It would certainly be exceedingly unfortunate if the Court were to hold that a limited company with a very small nominal capital can be formed for the purpose of trying to do unlawful, fraudulent and illegal acts, and that no one except the incorporated body is liable.

In my opinion, the injunction which I grant against the company involves a similar injunction against the signatories who have caused the company to be registered, and who remain the only directors and members of the company. No damages have been proved, and I do not think any have been suffered, because the defendant company has not carried on business; but as the signatories are the directors, and the sole shareholders in the company, I see no reason why I should not also grant the second injunction asked against them by the statement of claim. There will, therefore, be judgment for the plaintiffs for the two injunctions as asked, and the costs of the action, and the defendants must either get the approval of the Board of Trade to a change of the company's name or they must wind up the company.

¹ See the orders in this case verified from the originals in the Record Office, L. Q. R. ix 197. — F. P.

PEOPLE v. ENGLAND.

1882. 34 *New York Supreme Court* (27 *Hun*), 139.

CERTIORARI to the Court of Sessions of the county of Schenectady, to review the conviction of the defendant upon an indictment charging him with publishing in *The Sun*, a newspaper, an advertisement of an illegal lottery.

J. T. Schoolcraft, district-attorney, for the people.

N. C. Moak, for the defendant.

LANDON, J. The evidence tended to show that the newspaper, "*The Sun*," in which the advertisement of the lottery was printed, was published by a corporation duly organized and known as "*The Sun Printing and Publishing Association*;" that its business was managed by a board of trustees; that the defendant was one of the stockholders of the corporation, and employed as its treasurer and purchasing agent, and superintendent of its business affairs. It did not appear that the defendant had any knowledge of the insertion of the advertisement.

Upon the trial the defendant, by his counsel, in various forms of request, asked the court to instruct the jury that he could not be convicted if he had no knowledge or notice that the advertisement was printed by the corporation; that the fact that he was a stockholder or treasurer or agent or employee of the corporation would not of itself be sufficient to convict him, if the corporation published the advertisement without his knowledge. The court held otherwise, and instructed the jury that if the advertisement was published by the corporation of which the defendant was a member, he was the publisher within the meaning of the statute.

A conviction based upon this instruction cannot, we think, be sustained.

If the corporation did the acts constituting the offense, it must have done them by the direction or permission of its officers, and by the personal act of some of its agents or servants. It seems reasonable that when the officer or servant of the corporation is held to answer *criminaliter* for the acts of the corporation, that he should be permitted to require that some evidence be given showing his connection with the acts constituting the offense. He, and not the corporation, stands indicted. To prove that the corporation did the acts does not *per se* prove that he did them; it must also be shown either that the corporation did them by his hand, act, direction or permission, which, of course, is direct proof of his own acts; or such circumstances must be shown as to justify the conclusion, as a fact, that what the corporation did he did; in other words, the circumstantial evidence may show that the defendant actually and personally did the acts which constitute the offense.

If the defendant must have had some actual personal connection

with the illegal acts, much more, it seems to us, must he have had some notice or knowledge that the corporation was engaged in such acts if done by another. Otherwise the defendant might be convicted because of an act done by the hand of another, and without his consent or knowledge. The fact that he is a member of the corporation whose servants did the act may be a circumstance, to be left in connection with others to the jury, from which they may, under proper instruction, determine whether the defendant had any actual participation in the illegal acts charged; but for the court to hold, as a matter of law, that such membership charges him with criminal responsibility for the illegal acts of the corporation is, we think, wrong in principle, and unsupported by authority.

The conviction should be reversed and a new trial ordered.

LEARNED, P. J., and BOARDMAN, J., concurred.

Judgment and conviction reversed and new trial granted.

MILL v. HAWKER.

1874. L. R. 9 *Exch.* 309.¹

DECLARATION. Trespass by taking locks off the plaintiff's gates. Plea: not guilty by statute. Issue.

Plaintiff is the occupier of land, through which there runs a path, across which the plaintiff placed gates which he locked. At a meeting of the highway board for the district within which the path is situated, the board took the position that the path was a public highway; and also passed a resolution directing their surveyor to remove the obstruction, which he did.

The plaintiff brought this action against all the members of the board, who had concurred in the resolution and against Wickett, the surveyor.²

At the trial no evidence that the *locus in quo* was a highway was given.

KELLY, C. B., ruled that the members of the board who had concurred in the resolution were not liable individually, and that Wickett was not liable. A nonsuit was ordered.

A rule was obtained to set aside the nonsuit and for a new trial.

Kington, Q. C., and Pinder (*Lopes*, Q. C., with them), showed cause.

Arthur Charles (*H. T. Cole*, Q. C., with him), in support of the rule.

Cur. adv. vult.

CLEASBY, B. The judgment I am about to read is that of my Brother Pigott and myself.

¹ Statement abridged. Arguments omitted. — **ED.**

² So much of the case as relates to the liability of the surveyor is omitted. — **ED.**

[The learned Judge *held*, that the surveyor, Wickett, was liable.]

As regards the other defendants who came to the resolution in pursuance of which the illegal act was done, a question of some difficulty arises. It is said that the resolution, having been afterwards embodied in the order signed by the clerk, became a corporate act of the highway board, and that no personal liability of the members could arise upon it. We were referred to many authorities to shew that in respect of corporate acts the individual members of the corporation cannot be sued: see *Attorney General v. Mayor of Liverpool*; ¹ *Attorney General v. Bailiffs of Retford*.² There is, indeed, an express provision to this effect as regards the members of the highway board — but it is expressly limited to lawful acts of the board — in s. 9, subs. 6, of the Highway Act, 25 & 26 Vict. c. 61. And it is clear that this is so when the corporate acts are such as the corporate body is qualified to perform, and the resolutions and acts of the members are only introductory to the corporate body acting in the matter. But it is equally clear that when the acts are such as the corporate body is not by law qualified to do, and the corporate body, if they pretend to do them, are acting *ultra vires*, then the mere fact of giving a corporate form to the act does not prevent it from being the act of those who cause it to be done. It seems plain that in such a case the individuals and not the corporation really do the act, and no authority is needed for that conclusion. And in this case, unless the letter of the 30th November prevents it from being the act of the individual, it certainly was so in point of fact, for the defendant Wickett swears, in answer to the interrogatories, that he removed the locks by the direction of the highway board given at the meeting, that is, of the 29th of November. The cases of *Taylor v. Dulwich Hospital*,³ and *Reg. v. Watson*,⁴ may, however, be referred to in support of the proposition that the individuals really do the act; and in the case of *Poulton v. London & South Western Ry. Co.*, and particularly in the judgment of Blackburn, J.,⁵ the difference is clearly pointed out between acts which are properly corporate acts and acts which are not, as affecting the liability of the corporation.

The question in the present case, therefore, is, whether the act of causing the locks to be removed is one of those acts for which the corporate body is constituted or not. It appears to us that it is not one of those acts.

The effect of holding that such a body as the highway board were competent in their corporate capacity to commit such an act of trespass as the one complained of in this case, would be that, whenever the trespass was illegal and redress was had, the persons who had really caused the trespass would not be responsible, and the damages would

¹ 1 My. & Cr. 171.

² 3 My. & Cr. 484.

³ 1 P. Wms. 655.

⁴ 2 T. R. 199.

⁵ Law Rep. 2 Q. B. at p. 538.

be paid out of funds which ought to be applied in maintaining the roads, and the persons eventually responsible would be the ratepayers, and among them, perhaps, the persons entitled to redress, and to whom the damages were to be paid. And thus the members of the highway board would acquire a power to divert and waste the funds intrusted to them for public purposes by proceedings which might originate in feelings which it would be most inconvenient to inquire into.

KELLY, C. B.

Two questions arise upon this case. The first is, whether this action is maintainable, not against the highway board in their corporate character, but against the individual members of the board who were present at the meeting, and one of whom moved and another seconded the resolution; and I am of opinion that it is not. The making of the resolution was a corporate act done at a corporate meeting convened and held in strict conformity to the Act of Parliament. No one member of the board assumed to exercise or did exercise any personal authority or power. The resolution was the act of the corporation and consisted of the minute made at the meeting according to the Act of Parliament, signed by the chairman, and by the statute receivable in evidence without further proof. I conceive it to be settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individuals charged, and the corporate name be used as a mere colour for the malicious act, or unless the act is ultra vires, and is not, and cannot be in contemplation of law, a corporate act at all.

In *Harman v. Tappenden*¹ the Free Fishermen of Faversham, a corporate body, at a corporate meeting made an order of amotion or disfranchisement against the plaintiff, a free fisherman and a member of the corporation, upon which the plaintiff brought his action for damages against the six individual corporators who had made the order, and it was objected "That no action would lie to recover damages against individuals for acts done in their corporate capacity, and that non constat, but that all or some of the defendants might have voted against the order of amotion." When the case came before the Court upon a motion to enter a nonsuit and in arrest of judgment, the Court intimated very strong doubts on this ground how far the defendants were answerable in damages in their private character for acts done by them in their corporate capacity. And Lord Kenyon, C. J., said that he entertained considerable doubt, notwithstanding what was said in *Rich v. Pilkington*,² and *Rex v. Mayor of Rippon*,³ and added, "that he had many years ago moved for a mandamus to the master and fellows of Wadham College to compel them to put the college seal to a return which they were required to make, and to which Mr.

¹ 1 East, 555.

² Carth. 171.

³ 1 Ld. Raym. 563.

Windham, the master, had great objection with respect to the facts agreed upon by a majority to be returned, conceiving that he should thereby make himself individually liable to the consequences, but Lord Mansfield overcame his difficulty by an explicit declaration that what he thus did in his corporate capacity could not hurt him in his individual character." Lawrence, J., expressed the same doubt, and, finally, upon cause being shewn, the Court held that without proof of malice the action was not maintainable, and the rule was discharged: see also *1 Ventris*, 351, and *Rex v. Windham*,¹ the case alluded to by Lord Kenyon. It is true that where individuals make a pretended corporate act a cloak for a malicious libel or a libel on the administration of justice, the Court will grant a criminal information as in *Rex v. Watson*.² But an individual corporator is no more liable for a tort committed in his corporate capacity than for a debt due by the corporation. In either case I am of opinion that the action must be brought against the corporation in its corporate character and not against an individual member, who, like Mr. Windham in the *Wadham College Case*, may have been opposed to the act in respect of which the action may be brought. It was, indeed, once imagined, though on very technical grounds, that trespass would not lie against a corporation, and it is so stated in *Comyns' Digest*, Franchises, F. (19.). But, besides that, many authorities are to be found in the year books to the contrary, the law is now well settled that upon any tortious act committed by a corporation, or under its authority, or by its direction, trover or trespass is maintainable.

I cannot doubt, therefore, that this action ought to have been brought against the board, and all these decisions are uniform to shew that it would have been maintainable. The mischief and inconvenience that would result if the contrary were held to be law is great and obvious. If judgment be recovered against these defendants execution might issue for the whole amount of damages and costs against any one among them, and he would have no remedy for contribution against the rest, nor as it should seem, upon the facts of the case, for indemnity against the corporation. And it is at least doubtful whether the board would have a legal right to indemnify him out of the funds which come to their hands under the Act of Parliament. On the other hand, if the action had been brought against the board, and judgment obtained against them, they may pay the damages and costs out of the funds which they are enabled to provide for the various purposes of the Act by ss. 20-27, and others.

It was argued that no action could be maintained against the board on the ground that the resolution and the order to the surveyor were *ultra vires*. But I apprehend that this is a misapplication of the term *ultra vires*. If the board, by resolution or otherwise, had accepted a bill of exchange directing their clerk or other officer to write their corporate

¹ 1 Cowp. 377.

² 2 T. R. 199.

name or title across a bill drawn upon them for a debt, this would have been ultra vires, and no holder of the acceptance could have recovered the amount against them. It would have been void upon the face of it, and it is immaterial to consider whether the individuals who had written or authorized the acceptance would have been liable to any, and, if any, to what action at the suit of a holder for value. But it is otherwise with an act merely unlawful or unauthorized, as a trespass or the conversion of a chattel. (If such an act is to be deemed ultra vires, and therefore no action would lie against the corporate body by whom it had been authorized, it is clear that a corporation would not be liable for any tort at all committed or authorized by them, and the decisions above cited would be contrary to law.) Two cases have, however, been cited which seem to bear upon the question against the defendants. But the first, *Poulton v. London and South Western Ry. Co.*,¹ merely shews that there is no implied authority by a railway company to their servants to do an illegal act. Here no question arises upon an implied authority, for this board have expressly authorized and commanded the surveyor to do the act complained of. On the other hand, in the Dulwich College case, *Taylor v. Dulwich Hospital*,² the constitution of the college requiring that leases granted should be at a rack rent, the contract for a lease not at a rack rent was ultra vires and not binding on the corporate body, and so if the plaintiff had been entitled to the relief prayed, it would have been granted against the individuals who had executed an instrument in the form of a corporate act, but which, being ultra vires, was absolutely void.

[The learned Judge held, that the surveyor was not liable.]

Rule absolute.

[The defendants appealed to the Exchequer Chamber from the above judgment rendered by the Court of Exchequer. The judges in the Exchequer Chamber were all of opinion that the surveyor was liable; and that, as far as regards the surveyor, the nonsuit at the trial was wrong. And they held, that, inasmuch as it was one nonsuit, where the parties were sued together in a single action, the decision that the nonsuit was improper as regards one, sets it aside as regards all, and that consequently the judgment of the Court of Exchequer, making absolute the rule for a new trial, must be affirmed. L. R. 10 Exch. 92. As to the liability of the members of the board, no decision was given. Upon that branch of the case, some of the learned judges expressed themselves as follows:]

BLACKBURN, J. Now, with regard to the other question which has been raised and discussed, as to whether the corporators were liable, it is one of considerable importance and great difficulty. If it were necessary to decide that question, we should require time for consideration, and possibly, when we had considered it, our decision would not be unanimous. Our decision would be of no assistance in sending the

¹ Law Rep. 2 Q. B. 534.

² 1 P. Wms. 655.

case down to trial, and would perhaps be an embarrassment to the learned judge who may have to try it. We think it better, therefore, to leave the decision of the Court of Exchequer upon that point as it is. We leave it with the authority it had before, no better and no worse. On the new trial the facts will be ascertained, and the point reserved in such a manner that the Court before which it comes will be much better able to deal with it than they would be if they were to consider it now. (L. R. 10 Exch. pp. 92, 93.)

DENMAN, J. With regard to the question as to the corporators being personally responsible, I think that is a matter of great difficulty, and that it would be better not to send down the case with a divided opinion, or, by taking time to consider, to prevent the case from being tried at the next assizes. (L. R. 10 Exch. pp. 98, 99.)

ARCHIBALD, J. I entirely agree as to the inexpediency of taking time to consider the question as to the personal liability of the corporators, as to which there may probably be some difference of opinion. (L. R. 10 Exch. p. 99.)

[As to liability for infringement of patent.]

How far the officers, stockholders, and employes of a private corporation participate in its infringing acts, and thereby share its liability, is still an open question. That they may be enjoined whenever this is necessary to protect the patentee against future infringements is universally conceded; but whether they can be held in damages for past infringements has been variously decided. One opinion, following the doctrine of limited liability as usually applied to private corporate bodies, regards the infringing act as the act of the corporation alone, and declares that none of its members or officials legally participate therein. Another, affirming the rule that every voluntary perpetrator of a wrongful act of manufacture, use, or sale is an infringer, considers its directors, agents, and other servants, actually employing or authorizing the employment of the patented invention, as guilty of the infringement, and personally answerable to the patentee.—A third, viewing the acceptance of the benefit of the infringing act as furnishing the test of liability, treats its stockholders as infringers, whether or not they are its officers or agents, and exempts the latter, unless they are also members of the corporation. The first opinion is scarcely consistent with a due regard to the rights of the patentee, whose invention might then be practised with impunity by an insolvent corporation, nor with the general tenor of the patent laws, which permit no voluntary and unauthorized act of manufacture, use, or sale, direct or indirect, to pass unpunished. The third confuses the benefit derived by the stockholders with that accruing to the corporation,—the benefit of the former being no more closely

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related to the infringement than that of creditors or innocent employés, or that of dealers in or users of the products of infringing processes, — and is pregnant with evil and unjust consequences to all members of private corporations, especially to minorities who neither acquiesce in the infringement nor in the appointment of the officers or agents by whom it is committed. The second is in harmony with other doctrines of the law, sufficiently protects the patentee, and justly punishes those whose wilful acts place them on the same footing with individual infringers. Under this opinion, all agents who perform acts of infringement, and all stockholders, directors, and other officers, who, in the prosecution of the business of the corporation, authorize them, participate in the infringement, and are personally responsible to the patentee. Robinson on Patents, section 912.

Begin

LOWELL, J., IN NATIONAL CASH REGISTER CO. v.
LELAND.

1899. 94 *Federal Reporter*, 502, pp. 509-511.

LOWELL, J.

It is urged that, while a manager, or superintendent, or other like officer of a corporation may be liable for acts of infringement committed by the subordinate agents of the corporation in obedience to his orders, yet that a director who, by his vote in the board of directors, orders the commission of such acts, is not made liable for the acts committed in pursuance of the order which he has voted to pass. To hold a director liable in such case, it is said, is not merely to strip him of the defense that his act was done as the agent of another, but to impose upon him liability for an order which was not his order at all, but that of a board of which he was a member. This contention, plausible as it may seem at first sight, we deem unsound. We have said that the agent of a corporation who individually and personally commands a subordinate agent of that corporation to commit an act of infringement (omitting from consideration cases in which the agent merely transmits an order given him by another) becomes liable therefor, although the order so given is expressed to be, and is in fact, the order of the corporation. If this be so, it can hardly be contended that, when two or more agents join in giving such commands, they do not each become personally liable. To enable one of such agents — a director, for example — to escape liability by setting up that the order which he had joined in giving was neither his several nor his joint order, but was the command only of a fictitious person or entity of which he was a component part, would permit, in effect, what we have held to be unlawful, — that a man should justify the commission

of a tort by showing that he committed it, not in his personal capacity, but in some other. Thus in *Weir v. Barnett*, 3 Exch. Div. 32 (on appeal, sub nom. *Same v. Bell*, Id. 238), above referred to, it was assumed throughout that the defendant directors would have been liable if they had specifically directed the publication of the false prospectus complained of in the declaration. Those of them who obtained a verdict obtained it only because it was shown that the false statements were made without their direction, authority, or knowledge. The fact that the directions which they gave were given by them in their capacity as directors was not even suggested as a valid defense. Thus Lord Justice Bramwell said (page 243):

"The defendant, then, is not actually guilty of this fraud. He did not commit it himself, nor procure its commission knowingly. Had he done so, he would have been liable, whether as director, manager, printer of the prospectus, or entire stranger to the company, and acting merely from mischievous love of roguery."

See also, *Amy v. Supervisors*, 11 Wall. 136.

In *Ferguson v. Earl of Kinnoull*, 9 Clark & F. 251, a suit was brought against the members of a presbytery for rejecting a nominee as presentee to a church. The case contains much that has no bearing upon this discussion, but, among other defenses, the appellants set up "that the conclusions of the libel are directed against the defenders solely as individuals in consideration of acts alleged to have been done by the presbytery of Auchterarder in its official and corporate capacity," and much more to a similar effect. The House of Lords overruled this defense. Lord Lyndhurst said:

"But then, my lords, it is said that the action cannot be supported against these parties, as the act complained of was the act of the body. How can you bring an action, it is said, against them individually? My lords, it was these individuals who did the wrong. If all of them refused to take Mr. Young upon trial, and they, by their vote, prevented his being taken upon trial by the others, they are the parties, therefore, that did the injury, and consequently they are subject to an action. Suppose it had been a unanimous vote, — that all had concurred in it, — the party sustaining the injury might, if he had thought proper, have brought action against all of them or against any one, because it is laid down as a general principle that torts are joint and several. It would not have been necessary for him to bring an action against all if all had concurred, but he might have brought his action against one or more of them, as he might think proper. Here he has brought his action against those who did the wrong, and they are clearly liable to make compensation and to give redress. My lords, it was suggested at the bar, in the course of argument, that it is possible, as this was put to the vote, that some of these parties might have voted on the other side. Had that been the case, that circumstance, so far as such individuals are concerned, would have been a ground of defense; but that does not appear upon the record.

It is not stated; it is not suggested. On the contrary, from the shape of the record, the conclusion is directly the other way." Id. 282.

See, also, the remarks of Lord Brougham at page 289.

We refer to this case, not upon any supposed analogy between the Church of Scotland, or one of its presbyteries, and a manufacturing corporation, nor because the quasi judicial duties of members of a presbytery are deemed similar to the duties of directors, but only to show that members of a body who have voted to commit an actionable wrong cannot shield themselves by a plea that the wrong done was not the act of them as individuals, but merely of the body of which they were members.

We are of opinion, therefore, that by the general principles of law, and by analogy with other torts, a director of a corporation, who, as director, by vote or otherwise, specifically commands the subordinate agents of the corporation to engage in the manufacture and sale of an infringing article, is liable individually in an action at law for damages brought by the owner of the patent so infringed. As with other infringers, it is immaterial whether the director knew or was ignorant that the article manufactured and sold did infringe a patent.

SANDFORD v. McARTHUR.

1857. 18 B. Monroe (Kentucky), 411.¹

THIS suit was brought by Sandford, who held a large amount in notes purporting to be notes of the Newport safety fund bank of Kentucky, all of less denomination than five dollars, against McArthur, who was, during its existence, the President of the bank. A judgment was asked against McArthur individually for the amount of said notes.

As appears by the charter of the bank, as originally passed by the legislature, all notes to be issued thereby were to be printed and engraved by the auditor of the state, and to be secured by the deposit of stocks or mortgages on real estate. Said notes were to be numbered and registered by the auditor, and countersigned by him before they were delivered to the president of the bank. By an amendment to the charter notes of a less denomination than five dollars were authorized to be issued without being countersigned by the auditor; this alone was dispensed with, all other provisions of the original charter remained unchanged by the amendment. Sandford, in his petition, charges that under color of this amendment of the charter the

¹ Arguments omitted. — ED.

president, McArthur, confederated with others, some of whom were directors, and caused to be issued large amounts of notes of various denominations under five dollars, which were not received from the auditor, nor printed, nor engraved, nor numbered, nor registered, by him, and for the security of which no stocks, nor bonds, nor mortgages deposited with the auditor, but that McArthur, &c., caused said notes to be printed and engraved, and then issued as the notes of said bank, well knowing at the same time that such an issue was unauthorized, and in violation of the charter, and that this act was a fraud upon the persons to whom said notes were delivered, and of all others into whose hands they might come. It is alleged that the said notes were made payable to bearer, and on their face contained the promise of said bank to pay the same. They were received and passed in the community as legal notes, and being thus put upon the public they ultimately came, for a valuable consideration, into the hands of the plaintiff.

To this petition the defendant demurred, and assigned the following as causes of demurrer: 1. That the court had no jurisdiction of the case. 2. That there was a deficit of parties defendant. 3. That the petition shows no cause of action. The court overruled the demurrer as to the first and second grounds, but sustained it as to the third, and judgment was rendered for the defendant.

On a subsequent day of the term the judgment was set aside, and the plaintiff offered an amended petition, in substance averring that the notes so issued by the defendant purport to be the notes of said bank, but were not issued by the said bank, and were not the bills or notes of said bank; that they were made and passed by said defendant as a circulating medium, in lieu of and as the representative of money; but were not the notes or bills of any legally incorporated banking institution.

The defendant objected to the filing of the amendment. The court rejected the amendment, and rendered judgment in bar of the action. The plaintiff prayed an appeal.

Stevenson & Kinkaid, for appellant.

J. R. Hallam, and *Geo. B. Hodge*, for appellee.

SIMPSON, J. It is not alleged in these cases that the plaintiffs themselves have had any dealings with the defendants or that they received from them the notes which they hold, or that they were deceived with respect to the value of these notes by any misrepresentations or concealment on the part of the defendants. Neither do they allege that they received them in consequence of any inducements held out by the defendants, or any promises made by them that they would be liable for them. They may be regarded, therefore, as having received them as the notes of the corporation, which they purported to be, looking to it for their payment, and relying upon its liability for the amount of them.

The only question, therefore, that arises upon this state of case is, has the board of directors made themselves personally liable for these

notes to the holders thereof, by exceeding the authority which the charter conferred upon them, in issuing and putting them into circulation as the notes of the corporation, it having been heretofore decided by this court, in the case of *Watson vs The Bank*, that they were issued without authority?

The Directors are the agents of the corporation, and derive their powers not from the corporators but from the charter, and cannot bind their principal beyond it. The charter did not authorize them to issue the notes held by the plaintiffs, nor is the corporation bound for them as its notes, although we suppose that it is liable for the amount of them so far as it received, and used any of the benefits or profits derived from them. The holders may have a right to look to the general assets of the corporation, although they have no claim upon the fund set apart for the redemption of those notes which were issued in the manner prescribed by the charter.

It is a general principle, that where a person undertakes to do an act as an agent of another, and exceeds the authority delegated to him, he will be personally responsible therefor to the person with whom he is dealing; but this liability is founded upon the supposition, that the want of authority is unknown to the other party.

A distinction has been taken between acts of an agent for his principal in common cases, and similar acts done by the servants or officers of a corporation. In the first case it is said the extent of the authority is known only between the principal and agent, whereas, in the latter the authority is created by statute, to which all may have access who deal with the officers. (*Salem Bank vs Gloucester Bank*, 17 Mass. Rep. 29; *Angel & Ames on Corporations*, sec. 299.)

According to this doctrine it was the duty of those dealing with the officers of the corporation to know the extent of their powers, and to know whether the notes held by the plaintiffs were legally or illegally put into circulation. If they received them, knowing that they had been issued without authority, they cannot hold the officers personally responsible for them, inasmuch as the liability of the agent is founded upon the want of knowledge by the other party that he has exceeded his authority. The notes not having been stamped "secured by the pledge of state bonds and real estate," as required by the charter, carried on their face intrinsic evidence of the fact that they had not been lawfully issued, evidence which was visible to all persons, and which all persons receiving them were bound to notice.

Is the position correct, that it is the duty of those who deal with the officers of a bank to know the extent of the power conferred upon them by the charter under which they profess to act? We think it is as a general proposition. Although such corporations are private, yet as their notes are intended for general circulation, and the acts by which they are created are made public, and are of general interest, they do not properly fall under the denomination of private statutes, but must be classed with those that are general and public, or at least

they should be considered as *quasi* public acts. The public, therefore, is as much bound to take notice of their provisions as they are to know the provisions of any of the statutes passed by the legislature.

It is a general rule that a party cannot rely upon his own ignorance of such matters, as it was his duty to know, and which he could have known by the use of reasonable diligence. If, for instance, an agent should refer the party with whom he was dealing to a recorded power of attorney as showing the extent of his authority, the latter could not hold the former liable on the ground that he had exceeded his authority in contracting in the name of his principal.

Here the charter containing the powers under which the officers acted was published, and made accessible to all persons. Ignorance of its provisions must, according to well settled legal principles, be considered willful and inexcusable. Knowledge of them discharges the officers from all liability for having exceeded their authority, and as no other ground of liability is made out by the plaintiffs their action cannot be maintained according to the well settled principles of law by which such cases are governed.

It might, as a matter of public policy, be right to hold the officers of a corporation personally responsible whenever they transcended the powers conferred upon them by their charter, to the injury of the public. But, if such a liability be proper, it should be imposed by the terms of the charter, or by some general statute alike applicable to all corporations.

The defendants may have made themselves responsible to those persons with whom they had immediate dealings, if they were guilty of any fraudulent misrepresentations or concealments, but not being liable on the ground of a mere excess of authority, and the plaintiffs not having had any dealings with them, have not made out any valid cause of action against them.

Wherefore, the judgments are affirmed.

SEEBERGER v. McCORMICK.

1899. 178 *Illinois*, 404.¹

DEFENDANT in error, Leander J. McCormick, brought assumpsit in the Superior Court of Cook County against plaintiffs in error, Anthony F. Seeberger and others, as co-partners, to recover rent accruing from August 15, 1893, to May 1, 1895, upon a lease made by McCormick to the Market National Bank of Chicago of a certain office, to be used exclusively for the purposes of a bank. The rent stipulated in the lease was \$13,000 per annum, payable \$1083.33 monthly. Besides the common counts the declaration contained a special count declar-

¹ Arguments omitted; also part of opinion. — Ed.

ing specially on the written lease. Besides the general issue the defendants below filed special pleas denying their joint liability, but before the issues were made the parties waived a jury and submitted the case to the court for decision upon a written stipulation as to the pleadings and the facts, which was incorporated in the bill of exceptions and which contains the following: "The foregoing facts shall be held to be competent evidence, under the pleadings in this cause, to the same extent that they would be under any form of pleadings, the intention of the parties being, that under the pleadings in this cause the respective parties may establish any cause of action or defense that they could, respectively, establish under any form of pleadings." The lease was set out in full in the stipulation, and showed that it was executed by plaintiff, McCormick, and by the Market National Bank, by Seeberger, as its president, and Cox, its cashier. The defendants were all shareholders and directors of the bank. The bank was organized and incorporated, but had not received a certificate of the comptroller of the currency authorizing it to transact a banking business. No such certificate was ever issued, and the organization was abandoned within a few months after its inception, but it and its officers occupied the leased premises from May 1 until August 15, 1893, when the officers of the bank vacated and offered to surrender the premises to McCormick, and upon his refusal to accept such surrender left the key upon his desk. In October following, under another agreement between the lessor and lessee, the lessor took possession of the premises to lease the same upon such terms as might be agreed upon, to avoid as much loss as possible, with the agreement that it was to be without prejudice to the rights of either party; but the property was not rented, and it remained vacant until the lease was terminated, in 1895, in pursuance of its terms, when McCormick brought suit against the Market National Bank to recover the rent stipulated in the lease, but as the National Banking Act provides that "no association shall transact any business, except such as incidental and necessarily preliminary to its organization, until it has been authorized by the comptroller of the currency to commence the business of banking," and as the comptroller had not given such authority, it was held that the bank had no power to enter into the lease, and could be held liable only for use and occupation until the premises were vacated, August 15, 1893. (*McCormick v. Market Nat. Bank*, 61 Ill. App. 33; 162 Ill. 100; 165 U. S. 538.) McCormick then brought this suit for the rent for the rest of the term, against the officers, directors and shareholders of the bank, as before stated.

The trial court rendered judgment for the defendants. The Appellate Court reversed this judgment, and entered judgment against the defendants; assessing the damages at the amount of the rent stipulated in the lease from August 15, 1893, to May 1, 1895, viz., \$22,208.33. Defendants brought error.

David J. Baker and Hiram T. Gilbert, for plaintiffs in error.
Pence, Carpenter & High, for defendant in error.
 CARTER, C. J.

Considering, then, the case upon the questions of law arising on the record, the judgment of the Appellate Court must rest, and be sustained, if at all, upon one of three legal propositions, and counsel for McCormick insist that it can be sustained upon any one of them : First, that plaintiffs in error are liable to McCormick as co-partners, by virtue of the lease to the bank of which they were directors and by virtue of the agreed facts, the lease failing to bind the bank ; or, second, that they are liable on their implied warranty, in acting for the bank, that all the necessary steps had been taken in organizing the bank, so that it was authorized to execute the lease ; or, third, that plaintiffs in error are liable to defendant in error in an action on the case for deceit, for falsely assuming an authority which they did not possess and by which he was misled to his injury.

The stipulation, among other things, contains the following : " The said Leander J. McCormick, at the time of the negotiations prior to the execution of said lease and at the time of the execution of said lease, and at the time when said officers of said Market National Bank of Chicago took possession of the demised premises on the 22d day of June, A. D. 1893, understood and believed that said Market National Bank of Chicago was duly and legally organized as a national bank, and that, as such, it was ready to do a banking business, and that it had the power to enter into said lease and the agreements connected therewith, and had no knowledge or information to the contrary until the 15th day of August, A. D. 1893, at which time the officers of the said Market National Bank of Chicago informed said McCormick that said Market National Bank of Chicago had no power to enter into said lease, and offered to surrender to said McCormick said demised premises and said lease, and the said McCormick was then and there informed by the said officers of said Market National Bank of Chicago that said Market National Bank of Chicago had never been authorized by the comptroller of the currency to commence the business of banking, but nevertheless said McCormick then and there refused to accept such surrender."

As has been seen, the pleadings were sufficiently broadened by the stipulation to sustain a judgment in any form of action which the evidence agreed upon would establish. It is plain, upon principle and authority, that plaintiffs in error cannot be held upon the lease itself, as parties thereto. They are not named as parties to or otherwise in the instrument, and there are no apt words to bind them to its covenants. (*Hancock v. Yunker*, 83 Ill. 208.) But counsel for defendant in error insist that under all of the facts as found, plaintiffs in error are liable as co-partners in assuming to act for and on behalf of the bank as a corporation when the bank had no authority

to enter into the contract, and cite *Bigelow v. Gregory*, 73 Ill. 197, and *Loverin v. MacLaughlin*, 161 id. 417. In these cases this court held, in substance, that persons who associate themselves together by articles of agreement to become a corporation, but do not comply with the law so as to become a corporation, will be liable as partners for contracts made by them in the name assumed as the corporate name. In the *Loverin* case they were held liable under the statute of this State, and it was also there said they were liable independently of the statute. But in those cases there was a failure to incorporate, while in the case at bar the lessee, the Market National Bank, was a corporation *de jure*, but was by the act by which it was incorporated incapacitated from transacting the business of banking, or entering into contracts of the character of this lease, until it had received the certificate of the comptroller, which he was not authorized to issue until certain requirements had been complied with, one of which was that one-half of the capital subscribed had been paid in. But the bank had the corporate power to transact such business and make such contracts as were "incidental and necessarily preliminary to its organization." It is not a case where the party to the contract had no corporate power, but one where its corporate power was exceeded, — a case where the contract was not *ultra vires* corporations organized under the law under which it was incorporated, but *ultra vires* this corporation, because it had failed to comply with a certain provision, without compliance with which there was a deficiency of corporate power. Here there was a *de jure* corporation, while in the cases cited there was none. We are disposed to agree with the Appellate Court that the principle on which individuals so associated are held as partners is not in causing the corporation to exceed its powers, but in acting for and in the name of a presumed corporation which has no corporate existence. *Trowbridge v. Scudder*, 11 Cush. 83; *First Nat. Bank v. Almy*, 117 Mass. 476; *Gent v. Manufacturers' and Merchants' Mutual Ins. Co.* 107 Ill. 652; *Loverin v. MacLaughlin*, *supra*.

The second proposition of defendant in error is, that plaintiffs in error, if not liable as partners, are still liable *ex contractu* upon their implied warranty of their authority to execute, or to cause to be executed on behalf of the corporation, the lease in question. The principle is one of agency, and that plaintiffs in error, as the agents of the corporation in making the contract of lease, by necessary implication asserted to the lessor that they were in fact authorized to cause the lease to be executed by the corporation. Where the contract is made in good faith and both parties are fully cognizant of the facts, and the mistake is one of law only, the result of which is to exonerate the principal from liability because the agent had no lawful authority to make the contract, it is clear that the agent cannot be held liable, either *ex contractu* or *ex delicto*. The Appellate Court was authorized to find, and doubtless did find, that this was not such a case. These

directors were charged with knowledge that they had not taken the necessary steps to obtain, and had not obtained, the certificate of the comptroller necessary to confer power to make the lease, and it was a fair inference for the Appellate Court to draw from the agreed facts that McCormick did not know of this omission until August 15, 1893, — several months after the lease was executed and after possession of the premises had been taken by the lessee under it. The stipulation also showed that the plaintiffs in error canceled their articles of association in July, but remained in possession of the premises until the 15th day of August. They had by resolution authorized and directed the execution of the lease, and there can be no doubt of the legal sufficiency of the evidence to establish an implied warranty on their part of their authority to enter into the lease on behalf of the corporation, if such implied warranty is in law a sufficient ground on which to make them liable to respond in damages to McCormick for a breach of such warranty.

It is, however, contended by the plaintiffs in error that the law is that there is no such liability *ex contractu*, and that the only remedy is by a special action on the case, and then only when there has been some deception practiced on the opposite party, — some misrepresentation to or concealment from him of some material fact, — and which deception, misrepresentation or concealment operated to induce him to enter into the contract; and we are referred to *Duncan v. Niles*, 32 Ill. 532, and *Hancock v. Yunker*, 83 id. 208, and the opinion of the Appellate Court in this case, as settling the law to that effect in this State. We do not regard the cases cited as holding that an action *ex contractu*, upon the implied warranty cannot be maintained. That question was not in issue in either of the two cases cited, decided by this court. True, it was said that an action on the case for deceit would lie. In the *Duncan-Niles* case the action was brought against Niles on the note which Niles, assuming to act for the county, had given as the note of the county, and it was held that the contract was void and that neither party could be held on it, the county not having authorized it and there being no apt words in the instrument to bind Niles. It was there said, that “if the defendant falsely represented himself as the agent of the county and authorized to obtain this money, and did so obtain it, he may be reached by a special action on the case for the fraud, or in some other appropriate action, but not on the note itself.” And in the *Hancock-Yunker* case the action was covenant on the lease against the individual trustees who executed it on the part of the Chicago Literary Association, and it was held they were not liable on the instrument, it containing no apt words to bind them individually. Mr. Justice SCHOLFIELD, in delivering the opinion of the court, among other things said: “The question here is not whether these defendants may be held liable to the plaintiff in a proper form of action, whether they are liable in this form of action, — i. e., covenant upon the lease.” True, the opinion contains the

quotation in the *Duncan-Niles* case from *Abbey v. Chase*, 6 Cush. 56, that in Massachusetts the only remedy against the agent is by action on the case for falsely assuming to act as agent; but those cases cannot be treated as having decided that an action in assumpsit, not on the instrument itself but on the implied warranty of authority to execute it, cannot be maintained in this State. We are of the opinion that upon both principle and authority such an action can be maintained. Indeed, the fraud, if any, arises out of the contractual relations which the parties have assumed. The express contract purporting to bind the principal may be void, but if the agent has given his warranty, express or implied, that he is authorized by his principal to execute the contract when he has no such authority, we know of no principle of law or logic which would prevent the other party from recovering for the breach of such warranty where injury has been sustained by such breach. Why may he not waive the tort, where tort exists, and sue in assumpsit? That an action *ex contractu* on the implied warranty will lie, has been decided by many authorities. Mechem on Agency, sec. 549; 1 Am. & Eng. Ency. of Law, — 2d ed. — 1127; Anson on Contracts, p. 460; *Mahurin v. Harding*, 28 N. H. 128; *Collen v. Wright*, 7 E. & B. 301; *Cherry v. Colonial Bank*, L. R. 3 Privy Council App: 24; *Downman v. Williams*, 7 Q. B. 111; *Beattie v. Lord Ebury*, 7 Eng. & Irish App. H. L. 102; *Lewis v. Nicholson*, 18 A. & E. 502; Story on Agency, sec. 264; *Patterson v. Lippincott*, 47 N. J. L. 457; *White v. Madison*, 26 N. Y. 117; *Richardson v. Williamson*, L. R. 6 Q. B. 276.

Doubtless, in many cases a recovery may be had in either form of action, but in others the character of the suit must be determined by the facts of the case. Thus it is said in Mechem on Agency, sec. 549: "Much question has been raised as to the form of action in which the agent who acts without authority is to be held liable, — whether an assumpsit can be maintained or only a special action on the case. It would seem that this is a question to be determined largely by the particular facts of each case. Where an agent who knows that he has no authority makes express assertions that he possesses it, or so acts as to amount to an assertion of authority, and by so doing deceives and injures the other party who has relied thereon, it cannot be doubted that an action on the case for the deceit is an appropriate remedy. At the same time, an action of assumpsit upon the express or implied warranty of authority might also be maintained instead of the action on the case."

As the record in this case shows a clear right of action for a breach of the implied warranty of authority against the plaintiffs in error, we deem it unnecessary to decide whether or not the findings of fact by the Appellate Court would sustain an action on the case for deceit.

[Remainder of opinion omitted.]

Judgment affirmed.

CHAPTER XXI.

RIGHTS AND REMEDIES OF CREDITORS AGAINST
PROPERTY OF CORPORATION.

SECTION I.

*Generally.*¹NEW ORLEANS AUXILIARY SANITARY ASSOCIATION
IN LIQUIDATION.1901. 105 *Louisiana*, 172.²**APPEAL** from the Civil District Court, Parish of Orleans.

The New Orleans Auxiliary Sanitary Association was incorporated in 1879 for twenty-five years, unless sooner dissolved by a three fourths vote of the members.

Article 1 of the charter is as follows:

"The purposes and object of this corporation are hereby declared and specified to be the execution of such measures as are or may be necessary for the preservation of life and the public health, and to prevent the introduction and spread of disease; and to these ends to aid and assist the public authorities in carrying into effect all proper ordinances and laws relative to public health, and to adopt systematic measures for the collection and distribution of money or property derived from voluntary subscription, or otherwise, in such manner as will best tend to preserve life and property and to promote the prosperity and health of the city of New Orleans."

In 1880-1881, the city, by certain ordinances, granted to the association the use of certain portions of ground, with the provision that, when the land should revert to the city, the city should pay to the association the value of the improvements, machinery, buildings, &c., that might then be upon the land; the value to be ascertained by arbitration.

¹ "Creditors of a corporation have the same right as creditors of an individual to enforce their claims against the property of their debtor. They may subject any legal or equitable assets belonging to the corporation to the payment of their claims." 2 Morawetz, 2d ed. s. 779. — *En.*

² Statement abridged. Only part of the opinion is given. — *En.*

The association expended over sixty thousand dollars in establishing baths, pumps, buildings, tanks, pipes, &c., and maintained the same as public benefactions at its own expense for many years; the association being supported by the contributions of its members and by voluntary aid from other citizens.

At a meeting of the association, in 1895, a vote was passed (in part as follows), that, whereas the association is without means to longer accomplish any of the purposes for which it was created, or to pay current expenses, and is now largely in debt; be it resolved that certain persons are appointed commissioners to liquidate the affairs of the corporation and are authorized to take all necessary steps to transfer to the city the property now held by the corporation on the conditions named in the above ordinances.

In 1898, the persons named in the above vote, having been previously recognized by the Civil District Court as liquidating commissioners, took a rule on the city, alleging that bills to the amount of over seven thousand dollars have been presented against the association, and that the city is bound to pay for the buildings and improvements as provided by the ordinances, but that the city refuses to appoint an appraiser. The commissioners asked that the Mayor be ordered to show cause why he should not appoint an arbitrator; or, otherwise, why the property in question should not be sold at auction. After a trial in the District Court, it was decreed that the city be recognized as owner of the baths, pumps, and other improvements placed by the association upon the land of the city; subject, however, to the payment by the city of all debts incurred by the association in the acquisition, erection, maintenance, operation, and preservation of said machinery, pipes, and improvements, to the extent of the value thereof.

From this decree the city appealed.

Henry J. Leovy, for the Association.

Samuel L. Gilmore and *Arthur McQuirk*, for the City.

MONROE, J. The counsel for the city argues that all of the property of the association, now before the court, having been bought and paid for by voluntary subscription of citizens, and having been acquired by a corporation established for a public purpose, must be held to be property dedicated to public use and not available to creditors of the association in satisfaction of the debts due them.

He, therefore, contends that the judgment appealed from, in so far as it decrees that said property is subject to such debts, should be reversed.

The proposition stated ignores the fact that, whilst the purpose for which the association was established was public, the association itself was a private corporation, capable, in law, of owning property, and incurring debts, in its corporate capacity. If, in such a case, there is any law by which property so owned is exempt from seizure for debts so incurred, our attention has not been called to it. It may be that,

by reason of the declared purposes for which the association was established, the residuum of its property, after the payment of its debts and of the expenses of administration, will vest in the public rather than in the corporators, but that is a matter which need not be determined until the debts and expenses are paid and it is ascertained that such residuum exists.

[The court reversed the judgment appealed from, so far as it decreed that the city be recognized as owner of the baths, machinery, and other improvements; and so far as it rejected the demand of the commissioners for the sale of said improvements.

It was now decreed, that, unless the city should, within 30 days, consent to abide by all the conditions of the ordinances in respect to the appointment of arbitrators and the valuation of the improvements, then, and in that case, the commissioners should have leave to sell said improvements, or so much as may be necessary for that purpose, to pay the debts of the association. It was further decreed that the question of the ownership and destination of the residuum (if any) of property or money, in the possession of the commissioners after payment of the debts, is expressly reserved.]

MCCOLGAN v. BALTIMORE BELT R. R. CO.

1897. 85 *Maryland*, 519.

APPEAL from a decree of the Circuit Court of Baltimore City (DENNIS, J.), enjoining the appellant from proceeding to levy upon or sell the property of the appellee, mentioned in the bill of complaint.

The cause was argued before McSHERRY C. J., FOWLER, PAGE, BOYD and RUSSUM, JJ.

James McColgan, for the appellant.

W. Irvine Cross, for the appellee.

FOWLER, J., delivered the opinion of the Court.

The appellant, Charles C. McColgan, recovered a judgment against the Baltimore Belt Railroad Company in the Superior Court of Baltimore City for \$3,543.75, which was affirmed by this Court. It is admitted that the judgment is valid and subsisting and that no part of it has been paid or otherwise discharged. The appellant procured an execution to issue from this Court to the sheriff of Baltimore City to sell for the payment of said judgment the lands and tenements of the appellee company, consisting of twenty-four lots of ground, with the improvements thereon, in the city of Baltimore, which, it is admitted, form part of the right of way of the appellee and upon which it has laid its tracks, and which therefore constitute an essen-

tial part of its railroad and are necessary to its operation. The appellee's property is mortgaged for a loan of six millions of dollars, and a sale of the lots levied on would prevent it from earning money to pay this and other debts. The Circuit Court of Baltimore City, upon a bill filed by the railroad company, passed a decree enjoining the judgment creditor from selling the lots in question in satisfaction of his judgment — and hence this appeal.

The contention of the appellant is that he may, without showing any special or general legislative authority other than the right which any judgment creditor has to sell the property of a debtor, levy upon and sell the corporate property of a railroad company, which is essential to the performance of its corporate duties. And although this proposition is in direct conflict with the views of this Court as announced in *State v. Consolidation Company*, 46 Md. 1, and *Brady v. Johnson*, 75 Md. 449, and against the weight of authority, we are asked to adopt it and reverse the decree appealed from which is based upon and in entire accord with the cases just cited. In *Brady's case*, *supra*, we held that it is clear upon well settled principles that an execution will not lie against property such as the property here levied upon is admitted to be. And in the valuable notes to this case, as reported in 20 L. R. A. 737, a number of authorities sustaining our view are collected. The learned authors of *Elliott on Railroads*, the most recent and one of the most valuable works on the subject, cite *Brady's case*, and a long list of authorities, including the Supreme Court of the United States and the highest Courts of Indiana, Tennessee, Massachusetts, Ohio, Pennsylvania, California, Illinois and Nebraska in support of the proposition that "The franchise of a railroad company and corporate property essential to the enjoyment of the franchise, are not subject to sale on execution, unless the Legislature authorizes or assents to the transfer." 2 *Elliott on Railroads*, section 520. But in addition to this, all of the corporate property being mortgaged, the injunction was properly issued upon the authority of the case of *Gue v. Tidewater Canal Company*, 24 How. 257, cited in *Brady's case*, in which TANEX, C. J., said, delivering the opinion of the Court: "It would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders by dissevering from the franchise property which was essential to its useful existence."

The rule we have adopted in *Brady's case*, and which, as we have seen, is almost universally recognized, does not rest upon any corporate immunity, nor was it adopted to afford any peculiar protection to corporations generally. This doctrine is applicable only to quasi-public corporations, and since the State has charged them with a duty towards the public, it is against its policy to allow such corporations to be so crippled that the duty cannot be performed. In the case of

the *Plymouth Railroad Company v. Colwell & Jacoby*, 39 Pa. St. 337, JUDGE WOODWARD thus states the doctrine: "As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or by exercise of the delegated power of eminent domain, the company hold it entirely exempt from levy and sale; and this on no ground of prerogative or corporate immunity, for the company can no more alien or transfer such land by their own act than can a creditor by legal process; but the exemption rests on the public interests involved in the corporation. Though the corporation in respect to its capital is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out; they shall not be balked, therefore, by either the act of the company itself or its creditors."

The appellant fails to cite any authorities to sustain his position, and the only argument or suggestion he makes to support it is drawn from the alleged right under the general laws of this State of every judgment creditor in every case to have his judgment satisfied by execution, and from the provisions of the 19th Article of the Bill of Rights which guarantees to every man a remedy for any injury done his person or property. But it is too late seriously to consider a proposition, the adoption of which involves a departure from well settled rules of law, a reversal of our own well considered decisions, and the placing of ourselves in conflict with a long line of authorities, including the Supreme Court of the United States and the highest tribunals of many of the States of the Union.

Decree affirmed.

[In connection with *Com. v. Smith*, ante, 308, compare *Am. Loan, &c. Co. v. General Electric Co.*, decided in New Hampshire, Dec. 28, 1901. — ED.]

BOSTON, CONCORD & MONTREAL R. R. v. GILMORE.

1858. 37 *New Hampshire*, 410.¹

TRESPASS *de bonis asportatis* by a railroad corporation, against a sheriff and other defendants, who had attached locomotives and cars belonging to the corporation, and in daily use by them for transporting freight and passengers over their railroad. The attached property constituted the largest part of the ordinary rolling stock of the plaintiffs, and without the same the plaintiffs had not sufficient rolling stock for the transaction of their ordinary business.

It was agreed that judgment should be rendered according to the opinion of the court upon a case setting forth the foregoing (and other) facts.

¹ Statement abridged. Arguments and part of opinion omitted. — ED.

H. A. Bellows, for plaintiffs.

Chandler, for defendants.

BELL, J. We have carefully examined the authorities cited for the plaintiff, and are of opinion that they do not support the ingenious propositions of the counsel for the plaintiff, which we understand to be, that the property owned by railroad corporations, and which is necessary for the discharge of their public duties, is vested in them in trust for the public; that the franchise of the corporation is the principal thing, to which the track, depots, engines, cars, and the like, are mere incidents, and that all these constitute one entire thing, so connected that the cars and engines, etc., cannot be severed from their connection by an attachment, or seizure on execution, and held as security, or sold and applied as personal property ordinarily may be, to the payment of the corporate debts.

[After commenting on *Worcester v. Western R. R.*, 4 Metcalf, 564; *Pierce v. Emery*, 32 New Hampshire, 503; and *Willink v. Morris Canal Co.*, 3 Green's Chan. N. J. 377.]

In neither of these cases is there anything to sustain the doctrine that the franchise of the corporation is the principal thing, to which the right of way, track, depots, engines, cars, etc., are mere incidents, and from which they cannot be separated; nor the doctrine that these things constitute one entire thing, which must be sold, mortgaged, attached, or levied upon together; nor the doctrine that the cars and engines of a railroad corporation, when necessary for the discharge of its public duties, become in any way so connected with the franchise that they cannot be attached.

[After stating the case of *Farmers' Loan and Trust Co. v. Hendrickson*.]

The case goes far beyond any other decision, and it seems to us cannot be sustained. The reasons assigned for this conclusion are not only inconclusive, but incorrect in fact. It is said "that railway cars are a necessary part of the whole establishment, without which it would be inoperative and valueless. Their wheels are fitted to the rails; they are constantly upon the rails, and except in cases of accidents, or when taken off for repairs, nowhere else; they are peculiarly adapted to the use of the railway, and in fact cannot be applied to any other purpose; they are not, like farming utensils, and possibly the machinery in factories, and many of the movable appliances in stores and dwellings, the objects of general trade; they are permanently used on the particular road where they are employed, and are seldom if ever changed to any other." All these things are at least as true of the carts, plows, etc., used on a farm with reference to the farm, yet no one ever imagined them to be fixtures. And to those who habitually see the same cars and often the same engines running from the line of Canada to Boston, over roads owned by several corporations, the facts assumed appear entirely groundless. No particular cars, nor cars owned by the road, are necessary to operate it, since

many roads are operated with the cars of other corporations. The wheels are not fitted to any road in particular, but may be equally useful on any road of similar gauge; the engine and cars are not kept on the road, or lands of the same company, but are often used on other roads, and they are subjects of trade as much as coaches or steamboats.

The case settles nothing as to the rights of the railroad company and their execution creditor, — the rights of purchasers and others, as to things claimed as fixtures, being materially different.

The idea that property, either real or personal, may become a mere incident to a franchise, so that the franchise and property shall constitute an entire thing, is not found in any of the books of the common law, so far as we are aware. The right to a ferry is such a franchise, and the boats required for the transportation of passengers and their property, are entirely indispensable for the discharge of the public duties of the owner; yet we have found no instance where it has been claimed that such boats were exempt from seizure in discharge of the owner's debts.

The statute of 1816, relating to levies on the franchise of taking toll, and the Revised Statutes on that subject, give no countenance to such an idea; for they provide that by the sale of the franchise the toll-houses and gates shall pass to the purchaser, but the other rights of the corporation shall not be affected.

The property of individuals who owe duties to the public is not for that reason exempted from liability to the ordinary process of law, except so long as it is in actual use in the discharge of that duty. Such is the case of the contractor to carry the mail. It has never been held that the steamboat or coach and horses used in the conveyance of the mail were exempt when not in use. *Briggs v. Strange*, 17 Mass. 409; *Potter v. Hall*, 3 Pick. 368.

Considering, then, that it is not necessary, for the discharge of the public duties of these corporations, that they should be the owners of cars or engines — many such roads being operated with the cars of other corporations; that it is a matter of great uncertainty what articles of the personal property of such corporations are necessary for the discharge of their public duties; that no means exist by which it can be determined what is necessary, or otherwise; that it must be very difficult for courts to lay down any definite rule by which officers can be guided, who in such cases must decide at their peril; it seems to be neither judicious nor expedient to establish an exemption of this kind, unless it is done by the direct action of the legislature, who can provide the proper rules and safeguards for the safety of officers as well as of parties.

The court being of opinion that the property here in question was liable to be attached, there must be

Judgment for the defendant.

COVINGTON DRAWBRIDGE CO. v. SHEPHERD.

1858. 21 *Howard, U. S.*, 112.¹

APPEAL from U. S. Circuit Court for the District of Indiana.

In December, 1854, Shepherd and others recovered a judgment against the Covington Drawbridge Company, for upwards of six thousand dollars. At the same time, Davidson recovered a judgment against the same company for upwards of a thousand dollars.

The corporation was created by an act of the Legislature of Indiana, and built a drawbridge over the Wabash river, in that State, pursuant to its charter; was sued for a *tort* in the Circuit Court of the United States for Indiana district, where the recoveries were had. Executions at law were regularly issued, and at March term, 1855, of that court, were returned by the marshal, "nothing found." Alias writs of *fi. fa.* were taken out and levied on the bridge as real estate, and in November, 1855, the marshal proceeded to sell the rents and profits of the same on Davidson's judgment for the term of one year, at the sum of \$4,666.62. Davidson, the execution creditor, becoming the purchaser. The agent of Shepherd and others instructed the marshal not to sell the bridge on their judgment, and he returned the special facts. Davidson demanded possession of the bridge from the corporation, so that he might obtain the tolls, but the keeper of the bridge, and a principal owner of the stock, refused to surrender possession. In May, 1856, Shepherd, and those interested in the large judgment jointly with Davidson, filed their bill in equity in the Circuit Court of the United States for the district of Indiana, against the bridge company and Richard M. Nebeker, as keeper, agent, and manager, of the bridge; praying that the court should appoint a suitable receiver to take possession of the same, and receive the tolls and income, and apply them to discharge the judgments at law, after defraying expenses. The court made the decree prayed for, from which the bridge company appealed to this court.

O. H. Smith, for appellants.

Thompson, for appellees.

CATRON, J.

The consideration whether by a creditor's bill corporate property and franchises can be subjected to pay the debts of the corporation, by taking possession and administering its affairs, and drawing to the court its revenues, is a question of great importance and some difficulty. In advance of this question, it is insisted here that there exists in Indiana an adequate remedy at law; that Davidson's judgment is satisfied by the levy and sale of the tolls of the bridge; and Davidson having obtained a remedy by *fi. fa.*, Shepherd may do the same. To

¹ Statement abridged. Part of opinion omitted. — Ed.

ascertain whether Davidson obtained satisfaction by the marshal's sale, we must inquire what property was sold, and what title to it acquired, that could be made available by possession and the receipts of tolls.

The Covington Drawbridge Company was duly incorporated to build a bridge across the Wabash river where it was navigable for steamboats, and not subject to be bridged by an individual assuming to exercise a mere private right. The corporation had conferred on it a public right of partially obstructing the river, which is a common highway, and which obstruction would have been a nuisance, if done without public authority. This special privilege, conferred on the corporation by the sovereign power, of obstructing the navigation, did not belong to the country generally by common right, and is therefore a franchise; and, secondly, the authority of taking tolls from those who crossed the river on the bridge was also a franchise, and freedom to do that which could not be lawfully done by one without public authority; this franchise could only be conferred by the Legislature directly, or indirectly through public agents and tribunals, in pursuance of a statute. The bridge is part of a road, and an easement, like the road; and the privilege of making the bridge, and taking tolls for the use of the same, is a franchise in which the public have an interest; the corporation, as owner of the franchise, is liable to answer in damages if it refuses to transport individuals on being paid or tendered the usual fare; the law secured the tolls as a recompense for the duty imposed to provide and maintain facilities for accommodating the public. Whether the timbers and materials of this bridge could be sold at auction by the marshal, by virtue of a *feri facias* in his hands, as was held could be done by the laws of North Carolina in the case of the *State v. Rives*, 5 N. C. R. 297, we are not called on to decide in this case, as here the annual tolls were sold, and not the bridge itself.

By the laws of Indiana, lands and tenements cannot be sold under execution, until the rents and profits thereof for a term not exceeding seven years shall have been first offered for sale at public auction; and if that term, or a less one, will not satisfy the execution, then the debtor's interest or estate in the land may be sold, provided it brings two-thirds of its appraised value. The tolls, under the idea that they were rents and profits of the bridge, were sold for one year, according to the forms of this law. The tolls of the bridge being a franchise, and sole right in the corporation, and the bridge a mere easement, the corporation not owning the fee in the land at either bank of the river, or under the water, it is difficult to say how an execution could attach to either the franchise or the structure of the bridge as real or personal property. This is a question that this court may well leave to the tribunals of Indiana to decide on their own laws, should it become necessary. One thing, however, is plainly manifest, that the remedy at law of these execution creditors is exceedingly embarrassed, and we do not see how they can obtain satisfaction of their judgments from

this corporation (owning no corporate property but this bridge), unless equity can afford relief.

By the laws of Indiana, stocks in a corporation may be sold by virtue of an execution against the owner of the stocks, which the sheriff may transfer to the purchaser; but this law does not help these complainants; they did not proceed against the stocks; their judgment at law did not affect individual property, but corporate property. The question whether a railroad company's property, including the franchises, can be subjected to the debts of the corporation by a decree in equity, is treated very fully by Redfield on Railways, ch. 32, section 2, p. 571; there the substance of the decisions affecting the doctrine is given in cases where there were liens by mortgage. The subject was well examined by the Supreme Court of Georgia in the case of the *Macon and Western Railroad Company v. Parker*, 9 Geo. R. 378. The contest there involved claims of creditors. When speaking of the necessity of equity exercising jurisdiction, the court say "that the whole history of equity jurisprudence does not present a case which made the interposition of its powers not only highly expedient, but so indispensably necessary in adjusting the rights of creditors to an insolvent estate as this did." The road was sold according to the decree; but, to settle the difficulty as to the sale of a franchise without the consent of the power granting it, upon application, an act was passed by the Legislature, creating the purchaser and his associates a body corporate, with the powers and privileges of the old company. In England, the practice is, to order a receiver to be appointed to manage the corporate property, take the proceeds of the franchises, and apply them to pay the creditors filing the bill.

Blanchard v. Cawthorn, 4 Simons's R. 566.

Tripp v. The Chard Railway Company, 21 E. Law and E. R. 53.

All that we are called on to decide in this case is, that the court below had power to cause possession to be taken of the bridge; to appoint a receiver to collect tolls, and pay them into court, to the end of discharging the judgments at law; and our opinion is, that the power to do so exists, and that it was properly exercised. It is therefore ordered that the decree below be affirmed, and the Circuit Court is directed to proceed to execute its decree.

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PHILADELPHIA AND BALTIMORE CENTRAL R. CO.'S APPEAL.

1872. 70 *Pennsylvania State*, 355.

January 15th 1872. Before THOMPSON, C. J., AGNEW and SHARSWOOD, JJ. WILLIAMS, J., at Nisi Prius.

Error to the Court of Common Pleas of *Chester county*: No. 281, to January Term 1872.

On the 7th of March 1870 William McCullough recovered judgment for \$724.98 against The Philadelphia and Baltimore Central Railroad Company. On the 22d of September 1870 the plaintiff issued a fi. fa., to which the sheriff returned, "that the railroad company has no office in the county of Chester, and has no personal or real estate therein; therefore same remains wholly unsatisfied."

On the petition of the plaintiff the court (Butler, P. J.) awarded a writ of sequestration, and appointed Samuel M. Felton sequestrator.

The defendants removed the record to the Supreme Court by certiorari, and assigned the awarding the writ of sequestration for error.

T. Hart, Jr., and J. E. Gowen, for certiorari. — The Act of April 7th 1870, Pamph. L. 58, sect. 1, 1 Bright. Purd. 291, pl. 52, substitutes execution for sequestration: *Fox v. Hempfield Railroad* (West. Dist. U. S. Court), Pittsburg Leg. Jour. January 4th 1871. They referred to Act of June 16th 1836, sect. 72, Pamph. L. 774, 1 Bright. Purd. 289, pl. 42. Under the Act of 1836 all personal property of a railroad company necessary for its operations was exempt from fi. fa.: *Covey v. Pitts., F. W. and C. Railroad*, 3 Phila. R. 173; *Canal Co. v. Bonham*, 9 W. & S. 27. The Act of 1870 allows all the property and franchises of a corporation to be sold on a fi. fa. The Acts of 1836 and 1870 are inconsistent, and the remedy under the Act of 1836 is repealed: *Johnston's Estate*, 9 Casey 511; *Commonwealth v. Cromley*, 1 Ashmead 179.

W. E. Barber, contra. — The Act of 1870 should be construed strictly, for its effect would be to take from the public the rights which are granted to them by the incorporation of a railroad company; this the company itself could not do: *Ammant v. N. Alexandria and P. Turnpike*, 13 S. & R. 210; *Susquehanna Can. Co. v. Bonham*, 9 W. & S. 28; *Leedom v. Plymouth Railroad*, 5 Id. 226; *Plymouth Railroad v. Colwell*, 3 Wright 339; *Foster v. Fowler*, 10 P. F. Smith 31.

The opinion of the court was delivered, February 19th 1872, by

THOMPSON, C. J. — The Act of 16th June 1836, "relating to executions," provides a mode for the collection of debts due by insolvent corporations, viz., by sequestration. A return to the fieri facias, pursuant to the directions of the 72d section of the act, showing a demand made upon the chief officer of the corporation, or other officer in charge of its principal office, of the amount of the execution, without success, and a failure to find property liable to seizure and sale upon it, make way for the operation of the 73d section, and the creditor may, upon petition to the court showing these facts, have a writ to "sequester the goods, chattels and credits, rents, issues and profits, tolls and receipts from any road, canal, bridge or other works, property or estate of such corporation."

This statute was familiar to the profession and people, and largely practised under for a period of nearly twenty-eight years before the passage of the Act of 7th April 1870, which radically changes the

mode of proceedings against such corporations as were previously within the sequestration provisions of the Act of 1836. By this act, instead of sequestration, based upon the return of the *fi. fa.* under the Act of 1836, unsatisfied in whole or in part, an alias *fi. fa.* may be issued to seize and sell the franchises and property of such delinquent corporation out and out.

We must presume that the legislative mind, when the Act of 1870 was passed, was fully acquainted with the provisions of the old act, and that a change of remedy was intended in regard to corporation debts. That a change was intended appears on the face of the act. Its provisions, it is said in the act, were "to be in addition" to those contained in the 72d section of the Act of 1836 (not 62d, as it reads in the Pamphlet Laws, which is obviously a clerical error), "*and in lieu of proceedings by sequestration under the Act of 1836.*" The addition to the provisions of the 72d section was simply an alias *fi. fa.* to seize and sell the franchises and property of the corporation, and this was, says the act, to "be in *lieu* of proceedings by sequestration."

These words are so clearly expressive of an intent to supply the old remedy by a new one, that we need not the aid of the maxim of the common law, *leges posteriores priores contrarias abrogant*, to guide us to our duty in construing these acts. The Act of 1870 undoubtedly supplies the provisions of the Act of 1836, in regard to insolvent corporations to the extent noticed. Both cannot possibly co-exist as remedies. A judgment-creditor proceeding by sequestration could not restrain another from proceeding by execution, the obvious result of which would be to put an end to sequestration by a sale of the property and franchises. There is nothing in any act which would prevent the latter from taking his remedy by execution, under the new law. Unless, therefore, sequestration granted would result in restraining other creditors from pursuing their executions according to the new law, it is idle to think of sequestration now as a remedy; and we have said there is no law in the statute book to that effect. We hold, therefore, that sequestration is not grantable in this case, and that the proceedings below must be reversed. For myself, I think some additional legislation is needed to prevent the Act of 1870 from operating unjustly; inasmuch as by its provisions an entire road running the length or breadth of the state may be sold without proper notice. When, therefore, the writ issues, notices of the proposed sale should be required to be made upon the officers of the corporation, and the sale advertised in every county into which the road runs. This is but a personal suggestion, however.

The proceedings in sequestration are set aside, and the decree ordering the writ of sequestration is reversed.¹

¹ As to the provisions and construction of the Act of April 7, 1870, see also McCOLLUM, J., in *Greensburg Fuel Co. v. Irwin Natural Gas Co.*, A. D. 1894, 162 Pa. State, 78, pp. 84, 85. And see 181 Pa. State, p. 178. — Ep.

Finished Dec 20, 1909.

SECTION II.

Effect of Dissolution¹ upon respective Rights of Creditors and Stockholders ; and upon the Enforcement of Corporate Contracts.

MUMMA v. POTOMAC CO.

1834. 8 Peters, 281.²

STORY, J. This is a writ of error to the circuit court of the District of Columbia, for the county of Washington. The case presented on the record is shortly this : —

The plaintiff in error, Mumma, in June, 1818, recovered a judgment against the Potomac Company, for the sum of \$5,000. No steps were taken to enforce the payment of the judgment, nor any further proceedings had in relation thereto, until the 18th day of April, 1828, on which day a writ of *scire facias* was issued from the clerk's office of said court, against the said Potomac Company, to revive said judgment, which case was continued, by consent of parties, from term to term, until December term of said court, in the year 1830, at which term the following plea and statement were filed by consent of parties : — “ The attorneys upon the record of the said defendants now here suggest and show to the court that, since the rendition and record of said judgment, the said Potomac Company, in due pursuance and execution of the provisions of the charter of the Chesapeake and Ohio Canal Company, enacted by the States of Maryland and Virginia, and by the congress of the United States,³ have duly signified their assent to said charter, &c., and have duly surrendered their charter, and conveyed in due form of law, to the said Chesapeake and Ohio Canal Company, all the property, rights, and privileges by them owned, possessed, and enjoyed under the same, which surrender and transfer from said Potomac Company have been duly accepted by the Chesapeake and Ohio Canal Company, as appears by the corporate acts and proceedings of said company, and final deed of surrender from the said Potomac Company, dated on the 15th day of August, 1828, duly executed and recorded in the several counties of the States of Virginia and Maryland and the District of Columbia, wherein said Potomac Company held any lands, and wherein the canals and works of said company were situated ; which said corporate acts and proceedings the said attorneys

¹ As to modes of dissolution, see later chapter on that topic ; also later section as to reserved power in legislature to repeal charter ; also Chapter XVII., *ante*, as to forfeiture. — **ED.**

² Statement and arguments omitted. — **ED.**

³ 4 Stats. at Large, 101.

here bring into court, &c., whereby, the said attorneys say, the charter of the said Potomac Company became and is vacated and annulled, and the company and the corporate franchises of the same are extinct," &c.

Whereupon, the following statement and agreement were entered into and signed by the counsel for both parties, and made a part of the record.

"The truth of the above suggestion is admitted, and it is agreed to be submitted to the court whether, under such circumstances, any judgment can be rendered against the Potomac Company upon this *scire facias*, reviving the judgment in said writ mentioned, and that reference for the said corporate acts and proceedings, and the deed in the above suggestion mentioned, be had to the printed collection of acts, &c., &c., printed and published by authority of the president and directors of the Chesapeake and Ohio Canal Company in 1828."

Upon this statement and agreement the circuit court gave judgment that the plaintiff take nothing by his writ, and the question now is whether this judgment is warranted by law.

Two points have been made at the bar. 1. That the corporate existence of the Potomac Company was not so totally destroyed by the operation of the deed of surrender as to defeat the rights and remedies of the creditors of the company. 2. That the deed of surrender violates the obligation of the contracts of the company, and that the legislative acts of Virginia and Maryland, though confirmed by the congress of the United States, are on this account void, and can have no legal effect.

We think that the agreement of the parties completely covers the first point, and precludes any examination of it. That agreement admits the truth of the suggestions in the plea of the attorneys for the Potomac Company; and by that it is averred that the charter of the Potomac Company was duly surrendered to the Chesapeake and Ohio Canal Company, and was duly accepted by the latter; and that thereby the charter of the Potomac Company became and is vacated and annulled. And if we were at liberty to consider the last averment, not as an averment of a fact, but of a conclusion of law, the same result would follow; for the 13th section of the act of Virginia of January, 1824, incorporating the Chesapeake and Ohio Canal Company, declares that, upon such surrender and acceptance, "the charter of the Potomac Company shall be, and the same is hereby vacated and annulled, and all the powers and rights thereby granted to the Potomac Company shall be vested in the company hereby incorporated."

Unless, then, the second point can be maintained, there is an end of the cause; for there is no pretence to say that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man. We are of opinion that the dissolution of the corporation, under the acts of Virginia and Maryland, (even supposing the act of confirmation of congress out of the way,)

cannot in any just sense be considered, within the clause of the constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those States any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bonâ fide* purchasers, but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws. Besides, the 12th section of the act incorporating the Chesapeake and Ohio Canal Company makes it the duty of the president and directors of that company, so long as there shall be and remain any creditor of the Potomac Company, who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company (which the act enables him to do) to pay to such creditor or creditors, annually, such dividend or proportion of the net amount of the revenues of the Potomac Company, on an average of the last five years preceding the organization of the said Chesapeake and Ohio Canal Company, as the demand of the said creditor or creditors at that time may bear to the whole debt of \$175,800, (the supposed aggregate amount of the debts of the Potomac Company.) So that here is provided an equitable mode of distributing the assets of the company among its creditors, by an apportionment of its revenues in the only mode in which it could be practically done upon its dissolution, a mode analogous to the distribution of the assets of a deceased insolvent debtor.

Independent of this view of the matter, it would be extremely difficult to maintain the doctrine contended for by the plaintiff in error upon general principles. A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter.

Without going more at large into the subject, we are of opinion that the judgment of the circuit court ought to be affirmed. But as there is no such corporation *in esse* as the Potomac Company, there can be no costs awarded to it.

SHAYNE, APPELLANT, v. THE EVENING POST PUBLISHING COMPANY, RESPONDENT.

1901. 168 *New York*, 70.

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 16, 1901, which reversed an order of Special Term granting a motion to revive and continue against the trustees of a dissolved corporation an action for libel commenced prior to its dissolution and denied such motion.

The following is the question certified: "The defendant having been dissolved by the expiration of the term limited in its certificate of incorporation, and this action being for libel, and the action having for these reasons abated, has the court power to revive or continue the same against the trustees of the dissolved corporation in office at the time of such dissolution?"

Edward J. Gavegan, for appellant. [Argument omitted.]

Lawrence Godkin for respondent. The defendant died as an individual might die, through lapse of years, and had it been an individual the action clearly could not be revived. (*More v. Bennett*, 65 Barb. 338; *Odgers on Libel*, 355; *Townshend on Libel*, § 299; *Greeley v. Smith*, 3 Story, 658; *Bank of Selma v. Colby*, 21 Wall. 609; *R. S. [Banks Bros.' 9th ed.]* 1907; *Cregin v. Brooklyn C. R. R. Co.*, 75 N. Y. 192; *Matter of Meekin v. B. H. R. R. Co.*, 164 N. Y. 145; *Hegerich v. Keddie*, 39 N. Y. 258; *Gorden v. Strong*, 158 N. Y. 408.) There is no difference in the rule as to the survivability of an action for libel, where the deceased is a corporation, from that which exists where it is an individual. (*Marsteller v. Mills*, 143 N. Y. 398.) An action sounding in pure tort could not be revived against the trustees of the corporation even if the Manufacturing Act of 1848 had not been repealed. (*S. Nat. Bank v. Colby*, 21 Wall. 609; *Greeley v. Smith*, 3 Story, 658; *Mumma v. Potomac Co.*, 8 Pet. 281; *Cregin v. B. H. R. R. Co.*, 75 N. Y. 192; *Gorden v. Strong*, 158 N. Y. 408; *Grafton v. U. F. Co.*, 19 N. Y. Supp. 966; *Matter of Yuengling B. Co.*, 24 App. Div. 223; 9 Am. & Eng. Ency. of Law [2d ed.], 611.)

PARKER, Ch. J. Plaintiff brought this action to recover damages for alleged libels published in the defendant's newspaper in February, 1899, and when the action came on for trial on the 15th day of May, 1900, the defendant's attorney brought to the attention of the court the fact that the corporate existence of the defendant had terminated on the next preceding first day of January. As the action had abated, the plaintiff thereafter moved the court at Special Term for an order continuing and reviving it against the former directors of the defunct corporation and the motion was granted. The Supreme Court in its Appellate Division, however, reached the conclusion that the death of

the corporation operated to destroy the cause of action and so it reversed the order. There was a difference of view in the court, but the majority apparently felt constrained to follow the occasional *dicta* of judges that in actions of slander, libel, assault and battery, or false imprisonment, the property of the shareholders of the corporation is no more subject to pursuit after the dissolution of the corporation than is the property of an individual after his death. The statute providing for the maintenance of actions against executors or administrators of a wrongdoer, expressly excepts causes of the character last above named from the operation of the statute. (2 R. S. 447.) This statute modified the rule of the common law so as to permit actions to be brought against executors or administrators for wrongs done to property rights or interests of persons; but it does not affect one way or the other causes of action against corporations. Nor is there any statute in this state indicating a legislative policy to prevent the maintenance of actions against a corporation or its trustees after dissolution, whether the cause of action be founded on a wrong or otherwise. Nor are we foreclosed by authority in this court from considering the question on its merits, for neither the diligence of counsel nor patient investigation on our part has brought to light any decision of this court bearing directly upon the question.

For this court to lay down a rule which would cut off causes of action for wrongs against a corporation upon its dissolution would seem to be both arbitrary and unjust, and in some cases it could be taken advantage of by the officers of the corporation by permitting the charter to expire and afterwards reorganizing, instead of renewing the charter before its expiration. In this case there is no question of the good faith of the defendant. Its charter was allowed to expire by an oversight and for a little time it proceeded as if its charter were in full force and effect. But if it be true, as the defendant contends, that the termination of the charter operated of itself to put an end absolutely to all causes of action for wrongs, then it matters not whether the termination be due to oversight or design, for it is the civil death of the corporation, and not the cause of its death that destroys causes of action for wrongs. It hardly need be suggested that if such were the established rule there would be found plenty of persons interested in corporations who would plan to so take advantage of it as that meritorious causes of action might be destroyed with only the temporary embarrassment and expense incident to the organization of a new corporation. Of still further importance, however, is the fact that such a rule would work unjustly in every case to a plaintiff in an action for libel such as this one, assuming as we should that the plaintiff has a meritorious cause of action.

If a recovery be had during the lifetime of the corporation, the moneys required to satisfy the judgment are necessarily taken from assets belonging to the stockholders and reduce the value of their holdings in the amount required to pay the judgment. If a judgment

be recovered after the termination of the existence of the corporation the result is the same; for the avails of all the assets of the corporation after payment of all just debts and claims owing by it must be distributed among the stockholders if the corporation be wound up, or if another course be taken and a reorganization be had, the assets of the new corporation are reduced in value in the amount required to pay the judgment. So far as the stockholders, who are the owners of all of the assets of the corporation are concerned, therefore, it matters not whether the judgment be taken before dissolution or afterward, for in any event it is the assets of the corporation which are used in satisfying the demand. In the one case the action is prosecuted to judgment against the corporation, and in the other against the directors, who by force of the statute have become the trustees of the assets of the corporation for the benefit of the stockholders. But this is a difference of form, not of substance, for both the corporation and the trustees represent the assets out of which the judgment must be satisfied and in which the stockholders are alone interested after the satisfaction of all just debts and demands. It is apparent, therefore, that the stockholders have no just ground upon which to predicate a claim that the party who has been wronged by the corporation shall be deprived of his cause of action in the event of the dissolution of the corporation. On the other hand, the plaintiff needs his damages, and in some cases the vindication which an award of damages brings, none the less because, designedly or carelessly, the charter of the corporation is permitted to expire.

If we are right in the view thus expressed as to the merits of the controversy, there can be no doubt what would be the decision of the court were the question one which had never before been up for consideration in the courts of this country or England. It is urged, however, that notwithstanding that the merits appeal strongly in the plaintiff's behalf, and that there is an utter absence of decisions in this state standing in the way of a just determination, we are prevented from making that determination by a rule of the common law of England which concededly would have cut off such a claim as plaintiff's. Inasmuch as the Constitution of 1777 provided that "Such parts of the common law and of the acts of the legislature of the colony of New York as together already form the law of the said colony . . . shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same," it is contended that the common law is now in force except so far as it may have been expressly altered by acts of the legislature of this state. This court has interpreted this provision of the Constitution to mean not that all the common law of England was the law of the colony at the time of the making of the Constitution, but only so much of it as was applicable to the circumstances of the colonists and conformable to our institutions. (*Cutting v. Cutting*, 86 N. Y. 522, 529; *Williams v. Williams*, 8 N. Y. 525, 541.)

It is at least doubtful, as will be apparent when we come to consider briefly the history of the rule, whether it did become a part of the law of this state; but we prefer to rest our decision on the ground that if such a rule were applicable to this state at the time of the adoption of the Constitution, the effect of subsequent legislation regarding corporations created by and under the laws of this state has been such as to render it wholly inapplicable. This rule had its origin when corporations were either municipal, ecclesiastical, or eleemosynary, and business corporations were unknown. There were no stockholders or natural persons who were entitled to the assets of the deceased corporation and, as in the case of an individual dying without heirs, the personalty went to the king, while to prevent the realty from escheating to the king it was held that it reverted to the donor upon the ground that the grant being made to the corporation for public or charitable uses it was made only for its life. Against those corporations all causes of action whether upon contract or for tort were extinguished, and so, too, were all causes of action which the corporation had against individuals. (Kyd on Corporations — published 1793 — vol. II, page 516; Angell and Ames on Corporations, §§ 779 and 779a; Grant on Corporations, 804.)

Angell and Ames in § 779a say: "The rule of the common law in relation to the effect of dissolution upon the property and debts of a corporation has in fact become obsolete and odious. Practically it has never been applied in England to insolvent or dissolved monied corporations. . . . Indeed, at this day, it may well be doubted whether in the view at least of a court of equity it has any application to other than public and eleemosynary corporations with which it had its origin." It will be observed that the learned authors do not suggest that it was never applied by the courts to other than public and eleemosynary corporations, but that it is no longer applied.

In this state the rule has never been applied to business corporations, and as early as 1811 an act was passed constituting the directors of such corporations, in the event of voluntary dissolution, trustees to settle its affairs and divide the money among the stockholders after paying the debts due and owing by the corporation at the time of its dissolution. This statute, without substantial change, is now to be found in section 30 of the General Corporation Law, and when it is considered in connection with the other provisions of the statute relating to business corporations we find that the ancient rule that the liabilities of the corporations as well as the debts owing to them are extinguished by the dissolution of the corporations, the personalty vesting in the king and the real estate in the donor, has been entirely ignored by the law-making power in this state, which has instead provided a more equitable method for the distribution of the assets, which secures to the stockholders what is left after those are satisfied who have valid claims against the corporation. So if it be technically true that the rule once prevailed in this state because of the

language of the Constitution of 1777 — which I doubt — it is no longer in force because of the changed conditions surrounding the creation and dissolution of corporations and the distribution of the assets after dissolution. Ram in his work on Legal Judgments (page 73) states the rule, as it has often been applied by the courts and as we find it our duty to apply it in this case, in these words: “When a rule relates to the nature of things, as such nature existed at a former period, and the reason of the rule corresponds with that nature, then at an after time, if the nature of the things is altered, and by this alteration the rule is become too general, and the reason given for it fails, the rule in a case of this kind is no longer binding. In *Davies v. Powell*, WILLES, Ch. J., giving the opinion of the court, says, ‘When the nature of things changes, the rules of law must change too.’”

Nor do we think the rule *Actio personalis moritur cum persona* should be applied. It has long been in force both in England and this country, and in this state has received legislative approval in so far as causes of action for libel, slander and assault and battery are concerned, but our decisions have not extended the rule to the civil death of either persons or corporations. Nor has the language of our statute which authorizes the continuance of certain actions for moneys against the executors and administrators of wrongdoers, but excepts actions for libel, slander, assault and battery and false imprisonment, been held to include the civil death of either individuals or corporations, and it is sufficient for our present purpose to say that such an intent on the part of the legislature cannot be spelled out of the language employed by it. It is said that the rule of the common law, which has not been interfered with by statute so far as actions for libel are concerned, may, by a process of analogical reasoning, be so extended as to include artificial “persons,” and death resulting from an act of God to embrace death of a corporation by execution or other operation of law, and, further, that such reasoning has led learned judges to assume it to be the law that the dissolution of a corporation relieves its assets from that which would otherwise constitute a legal burden — that of responding for the damages occasioned to others through the misconduct of its representatives or agents. If it be true that, reasoning by analogy, but a single advance step need be taken in order to support the defendant’s position, that step should not be taken, however short it may be, inasmuch as the result reached would be without support in the elements of justice, as we have already attempted to show. It is not a short step, however, for the reason of the rule preventing suit against an executor for the wrongs of his testator is stated to be that as neither the executors of the plaintiff nor those of the defendant *have committed in their own personal capacity any manner of wrong or injury*, they should not be prosecuted for torts in actions which were originally designed for the punishment of the wrongdoer. On the other hand, the object of actions *ex contractu* being to reach “the property rather than the person, in

which the executors now have the same interest that their testator had before," it was decided that they should be revived and continued against the executor. (1 Woerner's Administration, §§ 290, 291, 292, and notes; *Phillip v. Homfray*, 24 Ch. Div. 457; *Finlay v. Chirney*, 20 Queen's Bench Div. 502-504.)

The remedy of a plaintiff, in an action for libel to recover damages, is against the property of the corporation solely. Whether his judgment be rendered against the corporation or against the trustees after dissolution, he can have satisfaction only out of the assets of the corporation. The object of his action, therefore, is to reach the property of the corporation, and, hence, it is in all respects within the very reason assigned in support of the right of a creditor to bring actions *ex contractu* against the executor.

Our conclusion is that as the plaintiff could have had satisfaction of his claim — if he have one — out of the assets of the defendant corporation had he prosecuted his action to judgment before the termination of the latter's corporate life, so should he now have satisfaction, as he has taken no step which either forfeits or affects his right, unless some rule of law stands across the pathway leading to justice for him, and after a careful examination of the subject we have been unable to find any such rule of law in this state.

The question certified to this court by the Appellate Division should be answered in the affirmative, its order reversed and that of the Special Term affirmed, with costs.

BARTLETT, HAIGHT, VANN, LANDON, CULLEN and WERNER, JJ., concur.

Ordered accordingly.

PEOPLE v. GLOBE MUT. LIFE INS. CO.

1883. 91 *New York*, 174.¹

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, entered upon an order made December 1, 1882, which affirmed an order of Special Term dismissing a claim presented by James C. Mix upon the fund in the hands of the receiver of the defendant.

The facts were stipulated substantially as follows :

Defendant was a registered policy life insurance company, organized under chapter 902, Laws of 1869. In December, 1876, said Mix entered into its employment as general agent, under a contract by which he was to receive a specified annual salary for a term of not less than five years. In May, 1879, the superintendent of the insurance department made the certificate provided for by section 7 of said act, and delivered it to the attorney-general, who thereupon commenced

¹ Arguments omitted. — Ed.

this action and obtained an order therein restraining defendant, its officers, etc., from the further prosecution of its business or the exercise of any of its corporate franchises. A receiver of the corporation was duly appointed and it was dissolved. Mix continued in the discharge of his duties under the contract until June 15, 1879, when he was notified by the receiver of his appointment, and of the dissolution of the company.

Edward C. James, for appellant.

George W. Wingate, for receiver.

John C. Keeler, for attorney-general.

FINCH, J. There was no breach of the contract between Mix and the insurance company by either of the parties. It was in process of continued performance according to its terms, and was unbroken at the moment when the injunction order was served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service the company had done nothing to prevent performance, and we must assume was both ready and able to perform. It had done no act which amounted to a refusal, or which made it unable to carry out its contract. For aught that appears it would have done so if let alone. But it was not permitted to perform. The State, by the injunction order operating alike upon the company and its agents paralyzed the action of both the contracting parties, so that neither could perform, or put the other in the wrong. Thereupon the company could not refuse, and did not refuse. To put it in the wrong, and make it liable for a breach, required action on the part of Mix. As a condition precedent he was bound to show both ability and readiness to perform on his part. (*Shaw v. Republic Life Ins. Co.*, 69 N. Y. 292, 293; *James v. Burchell*, 82 id. 113.) He could do neither. Performance by him had become illegal. It would have been a criminal contempt, and possibly a misdemeanor. There could be neither readiness nor ability to do the forbidden and unlawful acts. (*Jones v. Knowles*, 30 Me. 402.) So that from the necessity of the case, as there was no breach on either side before the injunction, so there could be none after. What had happened was a dissolution of the contract by the sovereign power of the State, rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement. One party was a corporation. It drew its vitality from the grant of the State, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent who contracted with it did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement, and constituted elements of the obligation. (*People v. Security Life Ins. Co.*, 78 N. Y. 115.) Then, too, the subject-matter of the contract was that of skilled personal services to be rendered by one and received by the other. It was inherent in the bar-

gain that a substituted service would not answer. The company were not bound to accept another's performance instead of the chosen agent's, nor was he in turn bound to work for some other master. The contract in its own nature was dependent upon the continued life of both parties. With the natural death of one, or the corporate death of the other, the contract must inevitably end. So that, in its own inherent nature, by the unexpressed conditions subject to which it was made, and by the decree enjoining both parties at the same moment from further performance, the contract was terminated and no breach existed.

It is easy to see how the situation of Mix differs from that of the policy-holders. We held in the *Security* case that the latter were creditors and stood upon a breach of their contract; but that breach was not the dissolution of the company. It ante-dated such dissolution and was the prior cause, of which the latter was the consequence. The reserve required by law was essential to the safety of the policy-holders. A covenant to maintain it was implied in every contract of insurance. That covenant the company broke by its own neglect, for which it alone was assumed to be responsible. The State found these contracts broken and for that reason interfered, and when its decree of dissolution came it had to deal with broken contracts and treated them as it found them. The same distinction explains the English cases which were commended to our careful attention. (*Yelland's Case*, L. R., 4 Eq. 350; *Clarke's Case*, L. R., 7 Eq. 550; *Logan's Case*, L. R., 9 Eq. 149; *Maclure's Case*, L. R., 5 Ch. App. 737; *Dean & Gilbert's Case*, Law Jour., 41 Ch. [N. S.] 476.) In all of them the companies stopped payment before any intervention of the law, and this being done by open and public notice, amounted to a voluntary refusal of performance, and, therefore, a breach of contract, established before the winding up orders were made and the liquidators appointed. When the court interfered it found broken contracts and a liability for a breach already existing, and dealt with what it found. It did not itself break what was already broken. Still another class of cases is obviously different. (*People v. National Trust Co.*, 82 N. Y. 283.) They are such as affect property rights and survive the death of the parties. Performance can be made by assignees or successors, and nothing in the essence of the agreement depends upon the life of the parties, or forbids its complete execution by others. And in all of the cases thus cited there was no incapacity affecting both parties alike. The one suing for a breach was free, so far as he was concerned, to offer performance, and had the necessary ability. He could thus put his adversary in the wrong, while here the same blow, at the same instant, stopped performance on both sides and made it illegal on the part of either.

But exactly at this point the learned counsel for the appellant interposes a proposition which presents a difficulty. Practically conceding most that we have said, he insists that the contract is only dis-

solved when its destruction comes from an outside and independent force, operating separately, and not occasioned directly or indirectly by the act or omission of the party pleading it as an excuse. In other words such party must be innocent and blameless in respect to the *vis major* which dissolves the contract, and if not so, cannot plead as an excuse what practically is his own fault and act. And our attention is directed to this feature as characterizing the cases in which the agreements were held to have been ended. They are grouped in the appellant's points and need not be repeated. He has stated their purport correctly. In all of them both parties were innocent of and blameless for the outside and independent agency which dissolved the contract. And the argument is now pressed that in the present case the company was not only not blameless for its dissolution, but that resulted from its own acts or omissions, was directly caused by them, and, therefore, such dissolution must be deemed its own act, which it cannot plead as an excuse. This leads to the inquiry whether the company was so the responsible cause of the action of the State as to make the dissolution its own act.

The answer is that no such fact is shown, nor is it a necessary inference from the facts which do appear. The judgment of dissolution is not here. We only know from the stipulation of the parties that the company was organized under chapter 902 of the Laws of 1869, and that the superintendent of insurance made the certificate provided for in section 7 of said act, and the attorney-general thereupon commenced the action for dissolution. The superintendent probably acted because the company's reserve had fallen below the lawful and safe level. Perhaps we ought to presume as much as that, but if so, the result may have happened from causes beyond the company's control and without its fault. It was its duty to invest the reserve and keep it interest-bearing. It may have done so with entire prudence at the time, and in strict accordance with the law, and then all values have so shrunk and dwindled from commercial causes as to have impaired the reserve. In such case the dissolution would have come from outside and foreign forces, operating independently and both beyond control. If it be said the company was still the indirect cause of the dissolution since it made the investments and failed to repair and strengthen them to the legal limit, the answer may be that it could not do it. The rule must not be pushed to an extreme.

[Remainder of opinion omitted.]

Order affirmed.

ROSENBAUM *v.* U. S. CREDIT SYSTEM CO.1898. 61 *New Jersey Law*, 543.

On error to the Supreme Court. For the opinion of the Supreme Court, see 31 *Vroom*, 294.

The plaintiff below and here seeks damages for breach of covenant for agency between him and the defendant, an insolvent corporation of this state.

On the 1st of December, 1892, by agreement in writing under seal, it was stipulated that the plaintiff should become and be the agent of the defendant, for the State of Massachusetts, for the term of five years thence next ensuing, in procuring applications for certificates of indemnity against excess of losses from credit, and in collecting and receiving all fees and premiums for certificates of indemnity issued upon applications therefor procured by him. The plaintiff was to secure new business for the company at the rate of at least \$125,000 each three months, for the first three years, and was to have not less than \$1,000,000 of business each of the last two years. He was also, at his own expense, to establish and maintain an office in the city of Boston, and employ and pay agents and other assistants sufficient in number to enable him to fully execute the contract upon his part. He was to be paid a stipulated sum per thousand dollars of guarantee issued by the company at his instance, upon receipt by the company of the premiums therefor.

The declaration alleges that this contract was broken by the defendant on the 23d of August, 1894, and from thenceforward by the defendant's ceasing to employ the plaintiff, without fault upon his part, and that he has suffered damage by deprivation of profits from the agency, and by loss of value in the furniture of the office established by him, and otherwise.

Among other pleas filed by the defendant was this: That on the 23d of August, 1894, in a suit in the Court of Chancery of New Jersey between the commissioner of banking and insurance and the defendant, the latter, by the court's order, was required to show cause before it, on the 4th of September then next, why an injunction should not issue and a receiver be appointed pursuant to the statute in such case made and provided, and that it and its agents were meanwhile required to desist and refrain from collecting or receiving any money owing to the defendant, and from paying out any money, and from selling, assigning, or transferring any of its property; that on the 4th of September, 1894, it was adjudged by the Court of Chancery that the defendant was insolvent, and that it had suspended its ordinary business for want of funds to carry on the same, and that it was not about to resume its business in a short time with safety to the public and advantage to its stockholders, and that a receiver be appointed to

take its assets and perform the duties imposed upon him by the act concerning corporations and its supplements; that on the 2d of October, 1894, by another order, the same court decreed that the charter of the defendant be and the same thereby was declared forfeited and void, except for the purpose of collecting the property and assets of the defendant, selling the same, and distributing the proceeds of sale among the creditors and stockholders of the defendant, and that in pursuance of such orders, the defendant, on the 23d of August, 1894, and from thence until the present time, ceased to transact business, and ceased to employ the plaintiff as its agent, which is the breach of covenant by the plaintiff in his declaration alleged.

The plaintiff demurred to this plea, and the Supreme Court overruled the demurrer. Upon this action of the Supreme Court error is assigned.

For the plaintiff in error, *Cortlandt Parker, Jr.*

For the defendant in error, *Howard W. Hayes.*

The opinion of the court was delivered by

THE CHANCELLOR. The first question presented is whether there was a breach of the contract upon the part of the defendant.

In the case of *People v. Globe Mutual Life Insurance Co.*, 91 N. Y. 174, upon which the opinion of the Supreme Court relies, both parties to the contract, the insurance company and its agent, were restrained by injunction, at the instance of the attorney-general, from the further prosecution of the business of the company and the exercise of any of its corporate franchises; also a receiver was appointed and the corporation was dissolved, and it was held that action by both the contracting parties was paralyzed by the injunction so that neither could put the other in the wrong, and there could be no breach of the contract.

The case before us differs from that. In this case the suspension of the business of the company was in August, and the forfeiture of the charter was in the October following. The only injunction was that which was contained in the order to show cause, of the 23d of August, which forbade the contraction of debts, the collection of money due to the defendant and the assigning of the defendant's assets, but did not restrain the defendant from exercising its franchises, or the plaintiff from continuing to procure and forward applications for guarantee, and the defendant from considering whether the guarantee desired should be issued. By its terms it was to continue in force only until the 4th of September. On the last-named day there was an adjudication of insolvency and an appointment of a receiver, but no continuance of the injunction or the issuance of another in its stead.

The statutes nowhere provide that a mere adjudication of insolvency and appointment of a receiver shall take from the corporation its right to transact business. The practical effect of the insolvency and receivership would probably be the stoppage of business, but the

right to continue would not be taken away. The chancellor might have issued an injunction to restrain the defendant and its agents from exercising any of the privileges or franchises of the defendant (Gen. Stat., p. 919, § 70), but it does not appear that he did so. Putting the corporation in charge of the receiver did not work its dissolution. *Kirkpatrick v. Board of Assessors*, 28 Vroom, 53. It is then apparent that prior to October 2d, 1894, the defendant may have broken its covenant with the plaintiff.

The second and broad question in the case is whether the forfeiture of the charter will bar the plaintiff's recovery of damages for the term of the contract unexpired at the date of that forfeiture.

Following the reasoning of the New York Court of Appeals in *People v. Globe Mutual Life Insurance Co.*, *supra*, the Supreme Court looked upon the contract as one merely for skilled personal service and treated the insolvency of the defendant and forfeiture of its charter as analogous to the death of the master of such a servant, which, as an implied condition in the contract, terminated it.

The Court of Appeals of New York carried the doctrine of implied condition in the contract still further. Judge Finch, in the case last cited, said: "What had happened was a dissolution of the contract by the sovereign power of the state, rendering performance on either side impossible. And this result was within the contemplation of the parties and must be deemed an unexpressed condition of their agreement. One party was a corporation. It drew its vitality from the grant of the state, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent who contracted with it did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement and constituted elements of the obligation."

The judge admits that this implication will not exist if it shall be made to appear that the corporation was culpably responsible for the intervention of the state.

It appears to us that both these implied conditions are forced, or at least forced in their application to cases in this state similar to the case now considered. It appears to us that the material fact that the corporation defendant is a stock company, and that its capital stands as a trust fund for the payment of its debts, is lost sight of. Such a company may become insolvent, and its charter may be forfeited when its assets may be more than sufficient to pay its debts. Every one who deals with such a corporation does so in view of the trust fund its capital provides, and the security that fund is intended to afford. The stockholders who provide the fund invite confidence because of it, that through such confidence their venture may be profitable to them. The mere statement of this situation makes conspicuous the injustice of any course of reasoning which will return to the stockholders their capital before satisfaction of all losses induced

by faith in it shall be made. The state creates corporations and requires of them the provision of such a trust fund, and when it destroys their corporate existence, natural justice requires that it shall provide for distribution of the fund so that no part of it shall be returned to those who offer it as security for the action of others, until the latter shall have all the protection against loss in their undertaking that it is capable of affording. We think that our statute undertakes this duty. It provides that the assets of an insolvent corporation shall be collected and sold, and that the proceeds of sale shall be divided among the creditors of the corporation (Gen. Stat., p. 920, § 72), in proportion to the amounts of their respective debts, including debts not due, and making proper rebate, and that the surplus only shall go to stockholders. Gen. Stat., p. 923, § 80. The general scheme of the statutes contemplates the ascertainment and payment of all just claims against the corporation. The terms "creditor" and "debt" are not used in a narrow, restricted, or technical sense. By its provision for reference of a claim to a jury (Gen. Stat., p. 922, § 78; Pamph. L., 1896, p. 302, § 77), machinery whereby the amounts of claims sounding in unliquidated damages may be ascertained is provided, and such claims are brought within the term "debts." We agree with the view taken in the Court of Chancery with respect to the liberality with which the statutes are, in this respect, to be construed. *Spader v. Mural Decoration Manufacturing Co.*, 2 Dick. Ch. Rep. 18; *Bolles v. Crescent Drug and Chemical Co.*, 8 Dick. Ch. Rep. 615.

It is considered that the existence of this trust fund, and the evident policy of the state with reference to it, forbid the application of the rule invoked by the Supreme Court under the analogy it deemed to exist. By the terms of the decree which forfeits the defendant's charter, the corporation is not dead, so far as the ascertainment of its obligations and their satisfaction are concerned. The record shows that this suit is brought by permission of the Chancellor virtually as a feigned issue out of Chancery in the insolvency proceedings, to aid in the ascertainment of an obligation or debt, and consequently the distribution of the assets of the corporation. It is a step in the administration controlled by the statute.

The demurrer to the plea should have been sustained, hence the judgment below will be reversed.

STATE v. COMMERCIAL STATE BANK.

1890. 28 Nebraska, 677.¹

ORIGINAL application by the Attorney General, under the provisions of Section 14, Chapter 37, Laws of 1889, for the appointment of a receiver to take charge of, and wind up the business of, the Commercial State Bank. The defendants are the Bank, McConaughy, its president, and Shreck, sheriff of York County. The petition alleges, *inter alia*, that certain persons are creditors of the Bank.

Shreck demurred to the petition.

William Leese, Attorney General, and *W. T. Scott*, for State.

Sedgwick & Power, *contra*.

NORVAL, J. [After stating the petition and the statute, and holding that the court has jurisdiction of the case.]

The petition contains all the facts required by the banking law and is sufficient to authorize the appointment of a receiver to take charge of and wind up the affairs of the defendant bank.

It appears from the allegations of the petition that the defendant McConaughy has made an assignment for the benefit of his creditors, and that the defendant sheriff, as such assignee, has taken possession of all of the estate of said McConaughy, by the direction of the officers of the defendant bank, who claimed that the defendant McConaughy is the sole owner thereof. This brings us to the principal question we are called upon to decide in this case, and that is, whether the property and assets of a banking corporation organized under the laws of this state, after it has ceased to do business, should be applied in payment of its debts, and whether this right is superior to those of a stockholder of the bank, or the assignee of a stockholder. The defendant bank is an artificial person, having its own property, assets, and liabilities. Credit was given to the corporation; its assets should be applied where the credit was given, and not be taken in payment of the individual debts of one of the stockholders.

It has been repeatedly held by this court, and we think correctly, that the property of an insolvent trading partnership should be applied first in payment of the firm debts. The same rule should be applied in winding up the business of the defendant bank. The property and assets are a trust fund for the payment of its debts and cannot lawfully be diverted. The rights of the creditors to the assets are superior to those of the stockholders or the creditors of a stockholder. Mr. Perry, in his work on trusts, states the rule thus: "A corporation holds its property in trust: first, to pay its creditors, and, second, to distribute to its stockholders *pro rata*. If, therefore, a corporation should dissolve and divide its property among its shareholders without first paying its debts, equity would enforce the claims of its creditors by converting

¹ Part of opinion omitted. — ED.

all persons, except *bona fide* purchasers for value, to whom its property had come, into trustees, and would compel them to account for the property, and contribute to the payment of the debts of the corporation, to the extent of its property in their hands." (Perry on Trusts, sec. 242.) This doctrine has been established by the adjudicated cases. In *Upton v. Tribilcock*, 91 U. S., 45, it is stated that "the capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts." The following authorities sustain the same position: *Taylor v. Miami Exporting Co.*, 5 Ohio, 165; *Goodin v. Cincinnati, etc., Canal Co.*, 18 Ohio St., 182; *Sanger v. Upton*, 91 U. S. 56.

It appears from the allegations of the petition that the assignee of McConaughy has, by direction of the officers of the bank, taken possession of all its property. This action on the part of the officers conferred no rights upon the assignee. It being established that the assets of the bank are a trust fund for all its creditors, it follows that the officers of the corporation were trustees for all the creditors and could not lawfully turn over the same to the assignee. The receiver heretofore appointed by this court is entitled to all of the property of the bank.

The demurrer to the petition is overruled.

Judgment accordingly.

The other judges concur.

BACON v. ROBERTSON.

1855. 18 *Howard (U. S.)*, 480.¹

APPEAL from the U. S. Circuit Court for the Southern District of Mississippi.

Bill in equity, by stockholders in the late Commercial Bank of Natchez, against Robertson, appointed by the State Court a trustee to wind up the affairs of the bank, whose charter had been judicially declared forfeited. The statutes of the State authorized the appointment of a trustee in such cases; and provided that after the payment of debts, "the surplus, if any, shall be ratably distributed among the stockholders." The bill alleges that all debts have been paid, and that property of great value remains with the trustee, who refuses to account for it to the stockholders. The object of the bill is to establish the title

¹ Statement abridged. Only part of the opinion is given. — ED.

of the stockholders to this surplus, and to obtain the ratable shares of such of them as are able and willing to join as plaintiffs in this suit.

A demurrer was filed.

The Circuit Court rendered a decree dismissing the bill. Plaintiffs appealed.

Wharton and Yerger, for appellants.

Lawrence, for appellees.

CAMPBELL, J.

The tendency of the discussions and judgments of the court of chancery in Great Britain, and of the courts of this country, is to concede the existence of a distinct and positive right of property in the individuals composing the corporation, in its capital and business, which is subject in the main to the management and control of the corporation itself; but that cases may arise where the corporators may assert not only their own rights, but the rights of the corporate body. And no reason can be given why the dissolution of a corporation, whether by judicial sentence or otherwise, whose capital was contributed by shareholders, for a lawful and perhaps laudable enterprise, with the consent of the legislature, should suspend the operation of these principles, or hinder the effective interference of the court of chancery for the preservation of individual rights of property in such a case. The withdrawal of the charter — that is, the right to use the corporate name for the purposes of suits before the ordinary tribunals — is such a substantial impediment to the prosecution of the rights of the parties interested, whether creditors or debtors, as would authorize equitable interposition in their behalf, within the doctrine of chancery precedents. *Stainton v. The Carron Company*, 23 L. and E. 315; *Travis v. Milne*, 9 Hare, 141; 2 Ib. 491. For the sentence of forfeiture does not attain the rights of property of the corporators or corporation, for then the State would appropriate it. If those rights are put an end to, it would seem to be rather from a careless disregard, or hardened and reckless indifference to consequences, on the part of the public authority, than from any preconceived plan or purpose. For, according to the doctrine of the text writers on this subject, the consequences are visited without any discrimination; the losses are imposed upon those who are not blameworthy, and the benefits are accumulated upon those who are without desert. The effects of a dissolution of a corporation are usually described to be, the reversion of the lands to those who had granted them; the extinguishment of the debts, either to or from the corporate body, so that they are not a charge nor a benefit to the members. The instances which support the *dictum* in reference to the lands, consist of the statutes and judgments which followed the suppression of the military and religious orders of knights, and whose lands returned to those who had granted them, and did not fall to the king as an escheat; or of cases of dissolution of monasteries and other ecclesiastical foundations, upon the death of all their members; or of donations to public

bodies, such as a mayor and commonalty. But such cases afford no analogy to that before us. The acquisitions of real property by a trading corporation are commonly made upon a bargain and sale, for a full consideration, and without conditions in the deed; and no conditions are implied in law in reference to such conveyances. The vendor has no interest in the appropriation of the property to any specific object, nor any reversion, where the succession fails. If the statement of the consequences of a dissolution upon the debts and credits of the corporation is literally taken, there can be no objection to it. The members cannot recover nor be charged with them, in their natural capacities in a court of law. But this does not solve the difficulty. The question is, has the *bona fide* and just creditor of a corporation, dissolved under a judicial sentence for a breach in its charter, any claim upon the corporate property for the satisfaction of his debt, apart from the reservation in the act of the legislature which directed the prosecution? Can the lands be resumed in disregard of their rights by vendors, who have received a full payment of their price, and executed an absolute conveyance? Can the careless, improvident, or faithless debtor, plead the extinction of his debt, or of the creditor's claim, and thus receive protection in his delinquency? The creditor is blameless—he has not participated in the corporate mismanagement, nor procured the judicial sentence; he has trusted upon visible property acquired by the corporation, in virtue of its legislative sanction. How can the vendors of the lands or the delinquent debtors resist the might of his equity? But, if the claims of the creditor are irresistible, those of the stockholder are not inferior, at least against the parties who claim to hold the corporate property. The money, evidences of debt, lands, and personalty acquired by the corporation, were purchased with the capital they lawfully contributed to a legitimate enterprise, conducted under the legislative authority. The enterprise has failed under circumstances, it may well be, which entitle the State to withdraw its special support and encouragement; but the State does not affirm that any cause for the confiscation of the property, or for the infliction of a heavier penalty, has arisen. It is a case, therefore, in which courts of chancery, upon their well-settled principles, would aid the parties to realize the property belonging to the corporation, and compel its application to the satisfaction of the demands which legitimately rest upon it.

In our view of the equity of this bill we have the support and sanction of the legislature of Mississippi. Their legislation excludes all the consequences which have been imputed as necessary to a sentence of dissolution on a civil corporation. From the plenitude of their powers, for the amelioration of the condition of the body politic, and the supply of defects in their system of remedial laws, they have afforded a plan for the liquidation and settlement of the business of these corporations in which the equities of the creditors and shareholders respectively are recognized, as attaching to all the corporate property of whatever description. And the inquiry arises, who is authorized to obstruct the enforce-

ment of these equities, in so far as the stockholders of the Commercial Bank of Natchez are concerned? The creditors have been satisfied. The defendant in the present suit is the trustee appointed under these legislative enactments. His demurrer confesses that he has received money, stocks, evidences of debt, lands, and personal property, which he refuses to distribute. He claims that the stockholders have no rights since the dissolution of the corporation, and if any, they must be looked for in the circuit court of Adams county, Mississippi. But the trustee cannot deny the title of the stockholders to a distribution. To collect and distribute the property of the corporation among the creditors and stockholders, is his commission—for this end he was placed in the possession of the property, and was armed with all the powers he has exercised.

His title is in subordination to theirs, and his duties are to maintain their rights and to consult their advantage. *Pearson v. Lindley*, 2 Ju. 758; 3 Pet. 43; 4 Bligh, 1; *Willis Trus.* 125, 172, 173. He is estopped from making the defence of a want of title in the stockholders. Nor is the objection to the jurisdiction of this court tenable. Ten years have nearly elapsed since this trust was created. The acts of the legislature contemplated a prompt and speedy settlement. They direct the reduction of all the property into ready money, and an early distribution among the parties concerned. The trustee confesses that he has not sold the lands nor personal estate, and that he has refused to distribute the money. He has committed a palpable breach of trust, according to the case made by the bill and as confessed by the demurrer. All the other trusts having been fulfilled, the stockholders are entitled to such an administration as will be most beneficial to them, or to a sale of the trust property in the manner prescribed by the statute of Mississippi. Nor is the objection to the form of the suit tenable. If the trust estate had been liquidated and the interests of the stockholders ascertained, any stockholder might have maintained a suit for his aliquot share without including any other stockholder. *Smith v. Snow*, 3 *Mad. C. R.* 310. But the trust estate has not been sold, nor are the names of all the stockholders ascertained, the trustee is called on to account, and the bill asks for the collection and disposal of the remaining property under the authority of the court of chancery.

The stockholders are interested in these questions, and are then proper parties to the bill. The number of the parties renders it impracticable to bring all before the court, and therefore the suit may be prosecuted in the form which has been employed in this suit. This court sustained such a bill in the case of *Smith v. Swormstedt*, 16 *How.* 288.

We do not intend to decide any of the questions of the cause which may arise as to the mode of administering the relief prayed for in this bill. Our opinion is that the plaintiffs have shown a proper case for equitable interposition by the circuit court, and that the decree of that court dismissing the bill is erroneous.

Decree reversed, and cause remanded.

In re HIGGINSON & DEAN, *Ex parte* THE ATTORNEY-GENERAL.

1898. *Law Reports* (1899), 1 *Queen's Bench Division*, 325.¹

APPEAL by the Attorney-General, on behalf of the Treasury, from the order of the Judge of the County Court at Liverpool, expunging the proof of the Royal Bank of Liverpool in the bankruptcy of the debtors, Messrs. Higginson & Dean.

The bankruptcy took place in 1847; and the liabilities of the debtors amounted to 871,000*l.* The Royal Bank of Liverpool proved in the bankruptcy for 566,000*l.*, and Messrs. T. H. Littledale & Co. and other creditors proved for smaller sums. The debtors are still undischarged, and the bankruptcy has never been completely closed.

The Royal Bank of Liverpool was a corporation registered under the Companies Act of 1862, and had passed, in 1867, a resolution for a voluntary winding up, which was carried on under the supervision of the Court.

On Oct. 29, 1887, it being considered that all the available assets of the bank had been collected, an order was made by *North, J.*, dissolving the bank as from Dec. 26, 1887.

The bank's proof for 566,000*l.* had been admitted against the estate of the bankrupts, Higginson & Dean; and from time to time dividends had been paid to the bank and to the liquidator in respect of the proof. It was assumed previously to the dissolution of the bank that there were no further assets of the bankrupts remaining to be got in, and that no further dividends could be expected, and the liquidator had so reported.

Recently, however, it has been discovered that some old railway shares, which were exchangeable for shares in the North Eastern Railway Co., belonged to the bankrupt estate; and the official Receiver, acting as trustee in the bankruptcy, has realised for the estate and has in his hands a sum of 6,500*l.*, the proceeds of the sale of these shares. The question now is what is to be done with about 4,000*l.*, the bank's share.

On Sept. 16, 1898, Messrs. Littledale & Co., whose proof against the debtors' estate had been admitted for 69,000*l.*, as creditors in the bankruptcy, moved in the County Court to expunge the bank's proof, claiming in effect the bank's 4,000*l.* as divisible among themselves and the other still existing creditors. The Treasury opposed the motion, claiming to be entitled in right of the Crown to be substituted in the place of the bank, on the ground that the bank's interest passed to the Crown as *bona vacantia*. As an alternative to the

¹ The facts and arguments are more fully given in 5 *Manson & Cook's Bankruptcy Reports*, 289. The statement here is compiled from both reports; and the extracts from the arguments are taken from the report in 5 *Manson & Cook*.—Ed.

Crown's claim it was suggested that the money ought to be carried to the "Unclaimed Dividends Account" in bankruptcy, which is applicable for some public purposes.

The County Court Judge made an order expunging the bank's proof, holding that the bank "was the subject of annihilation in 1887, and could after that neither sue nor be sued, nor possess any property, nor have any claim in respect of property;" and that "at present there is neither a dividend nor a creditor to receive it in existence, but when the creditor was extinguished his proof was extinguished so far as regards any further claims." He added that "the money out of which the dividend might be declared was never without an owner, namely, the assignee or trustee of the bankrupts' estate, and, if so, the dividend could not pass to the Crown as property the owner of which could not be found."

The appeal was argued before WRIGHT and DARLING, JJ.

Sir R. B. Finlay, Solicitor General, Ingle Joyce, and H. Ivory, for the Crown.

The effect of expunging the proof would be to give the fund for distribution among the other existing creditors of the bankrupts.

If the property does not go to the Crown direct as *bona vacantia*, it goes to the Board of Trade as unclaimed dividends: . . . It is better that the property should go to the Crown, as in that case the creditors of the bank would have a good case for applying to have the money paid over to them.

Stewart Brown, for the Official Receiver:

Debts due to a dissolved corporation go to the Crown for the simple reason that there is no person who can give a good discharge for them.

The property either goes to the Crown as *bona vacantia*, or as trustee for the corporators of the dissolved corporation. [He also referred to Morawetz Corp., 2d ed. s. 1032; Angell Corp., 8th ed. p. 164.]

H. Reed, Q. C., and Leslie F. Scott, for Littledale & Co.

The corporation here was a statutory corporation, and such a corporation when once dissolved cannot be revived unless the dissolution can be impeached for fraud: *In re London and Caledonian Marine Ins. Co.*, 11 Chan. Div. 140.

The dissolution is a bar to any subsequent actions: *Coxon v. Gorst*, L. R. (1891), 2 Chan. 73.

On dissolution the corporation therefore ceased to be creditor, and no right of proof remained in respect of its debt: *In re Trevor, Ex parte Richards*, 4 Deacon & C. 190.

"The debts of a corporation, either to or from it," as stated by

Blackstone (1 Bl. Com. p. 484), "are totally extinguished by dissolution." The proof ought, therefore, to have been expunged. . . .

Until a dividend was declared the debt was a mere *chose in action* — not a chattel; and as such the Crown could have no claim as *bona vacantia*: *State Bank v. The State*, 1 Blackford's Indiana Reports, 267; Morawetz, Corp., 2d ed., s. 1031. The basis of the doctrine of "*bona vacantia*," on which the Crown's claim rests, is that the "*bona*" must exist without an owner. Here the "*bonum*" is not "*vacans*." The property belongs to the estate. The effect of the bankruptcy is to create a trust in favor of the estate: *Cunnack v. Edwards*, L. R. (1896), 2 Chan. 679.

[WRIGHT, J.: Is your argument that a corporation only acquires a title for the term of its duration?]

Yes. That proposition follows from *In re London and Caledonian Marine Ins. Co.*, and *Coxon v. Gorst*, *ubi supra*. The dissolution of a company frees it from all its liabilities; and if it does not deprive it of all its rights also it would lead to this anomaly — that there would be no set-off: Grant on Corporations, p. 303.

The *Solicitor-General*, in reply.

The Crown is in the same position as if a creditor had died intestate without next of kin: *Dyke v. Walford*, 5 Moo. P. C. 434, 495.

In that case the Crown could take out administration. The fact that administration cannot be taken out in the present case is an accident. . . .

This fund is not a *chose in action*. It is an asset which has come into the hands of the trustee in the bankruptcy which he has converted into money. Before a proof can be expunged there must be a failure of the debt — not of the creditor. From the time that the bank was dissolved, the Crown became entitled to stand in the bank's place. . . . *Ex parte Lacey*, 6 Vesey, 625.

Cur. adv. vult.

WRIGHT, J. [After stating the case.] Subject to one difficulty, I think that the grounds of the learned county court judge's decision cannot be maintained, and that the Crown is entitled to succeed.

From the time of Lord Thurlow's decision in *Middleton v. Spicer*, 1 Bro. C. C. 201, in 1783, it has been an accepted proposition of law that chattels real or personal vested in a person as a mere trustee upon private trusts which have failed are as a general rule held by him as a trustee for the Crown of *bona vacantia*; and during all the period which has elapsed since that decision no exception from the rule seems to have been established. It has been illustrated by many cases which show that the possession conferred on the trustee for purposes of jurisdiction or administration gives him no beneficial title, as by occupancy or otherwise, which he can conscientiously set up against the Crown. Such cases are: *Barclay v. Russell*, 3 Ves. 424, at p. 430, per Lord Loughborough; *Powell v. Merrett* (1853), 1 Sm. & G. 381, Stuart, V. C.; *Cradock v. Owen* (1854), 2 Sm. & G.

241, Stuart, V. C. ; *Read v. Steadman* (1859), 26 Beav. 495, Romilly, M. R. ; *Cunnack v. Edwards*, [1896] 2 Ch. 679, C. A. And in *Dyke v. Wulford*, 5 Moo. P. C. 434, the right of the Crown as against the ordinary to *bona vacantia* in cases of intestacy is traced back to very early times.

Nor, I think, is there any authority for holding that the Crown is in any worse position in relation to chattels held in trust for a corporation which has become dissolved than in relation to chattels held in trust for a natural person deceased. The same principle seems applicable in both cases. The Courts will not allow a person who has obtained title or possession as a mere trustee of chattels to set up unconscientiously any beneficial title by occupancy, possession, or otherwise. The text-books, such as those of Kyd, Grant, and Lewin, agree, though in some cases with an "it seems," that the Crown is entitled to the personal estate of a dissolved corporation aggregate.

Nor is there any authority for holding that the creditors, other than the dissolved Bank, have any *jus accrescendi*, or of survivorship, entitling them to the share of the creditor who has become extinct without successor or representative. In *Ashley v. Ashley*, 4 Ch. D. 757, where, in a suit for administration, such a claim was made and failed, James, L. J., asked why the Crown might not take out representation to the petitioners. 4 Ch. D. at p. 763. *Prima facie*, therefore, as it seems to me, the Crown is entitled.

The difficulty is, that, as it is argued, on the dissolution of the Bank, not only did its artificial personality come to an end, but the debt due to it from the bankrupts lapsed or was extinguished. The existence of a debt, it is said, imports the existence of two parties to the obligation, and the obligation of the debtors to the bank is not, upon the dissolution of the bank, converted into an obligation of the debtors to the Crown. The bank, therefore, has ceased to be a creditor, and the Crown has not become a creditor ; the ground of the proof has gone as completely as if it had never existed, and the proof ought to be expunged, with the consequence that the official receiver is now a trustee of the fund for the remaining creditors, as if there never had been any others. Therefore, it is argued, there is no failure of *cestuis que trustent*, and no property which, for default of any *cestui que trust* to claim it, can be said to be held in trust for the Crown.

The authorities for the proposition that on the dissolution of a corporation aggregate debts due to or from it are extinguished are by no means clear or satisfactory. In 1 Bl. Com. p. 484, and in 2 Kyd on Corporations, p. 516, and in Grant on Corporations, p. 303, such a proposition is stated, but in terms which suggest that no more is meant than that, after the dissolution, the individuals who were members or officers of the corporation cannot sue or be sued in respect of its rights or obligations : and this is all that is established by the cases there cited. "The debts of a corporation" (Blackstone

says), "either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover or be charged with them, in their natural capacities; agreeable to that maxim of the civil law, *si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent.*" The American decision in the case of *The State Bank v. The State*, 1 Blackford's Indiana Rep. 267, relies on those authorities as supporting the general proposition, but it does not advert to this qualification, or add new references to authority, and the authorities cited do not in any way support the proposition, except as so qualified. Grant on Corporations (published in 1850), p. 303, is explicit in the same sense as the American case last cited, but does not refer to any authority which, so far as I can see, has any bearing on the matter.

Nor do the old authorities as to the effect of dissolution of municipal or other corporations add anything decisive of the question. In the 17th and 18th centuries corporations aggregate, constituted by charter or letters patent, were numerous, and questions frequently occurred as to the effect upon their rights and obligations of dissolution, revival, and reincorporation, with or without change of name or constitution. Many references to such cases will be found in Anderson's Reports and in *Rex v. Pasmore* (1789), 3 T. R. 199. I cannot find that in any case the rights or obligations of a corporation were held to be affected by a technical dissolution. Nor, on the other hand, can I find a case in which such a question has been decided, where the corporation had not been revived, or some provision made by statute or charter with reference to its obligations. In *Mayor, &c., of Colchester v. Seaber* (1766), 3 Burr. 1866, the revived corporation sued in its own name on a bond given to the dissolved corporation, and succeeded. Sir Fletcher Norton, for the plaintiff corporation, argued that the goods and chattels of the old corporation, including its choses in action such as the bond, had on its dissolution passed to the Crown, and that the Crown in granting a charter of revival had regranted them to the revived corporation. Mr. Dunning, on the other side, neither admitted nor denied this, and the Court is not reported to have expressed any opinion on this point, it being held that there was only a qualified dissolution, and no absolute break of continuity.

Suppose the bank at the time of its dissolution had been in credit at another bank, or held notes of another bank, or had issued notes of its own. Would the dissolution have destroyed the obligations in these cases? In the United States of America there have been two decisions of Story, J., which are against such a conclusion. In *Wood v. Dummer* (1824), 3 Mason, 308, the charter of a bank had expired. Before dissolution the bank had distributed its capital amongst its stockholders, without providing for payment of outstanding notes. It was held that after the dissolution noteholders were entitled to make stockholders account to them, as for moneys impressed with a trust of

which the stockholders had notice. In *Mumma v. Potomac Co.* (1834), 8 Peters, 281, it was contended that the dissolution of an insolvent incorporated company, under a statute of the Legislature of a State, was inoperative, as being contrary to the Constitution, which prohibited the impairing of obligations by the Legislatures of particular States. Story, J., however, held that the obligations were not impaired by the dissolution: "The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws." 8 Peters, at p. 286. This statement of the law may not perhaps be entirely applicable in this country, but it requires consideration. It might be reasonable to enact that, in analogy to the immemorial law of executors and administrators, and the statute of 31 Edw. 3, st. 1, c. 11, on the dissolution of a corporation aggregate all its rights, including its rights of action on executed contracts, such as those evidenced by bank notes or bonds, or on claims in debt, devolved upon the Crown, subject to payment of the corporation's own debts. It would, however, I think, in the present state of the authorities, be judicial legislation to declare the Crown entitled to maintain actions in such cases except where it can allege a trust. Such a declaration may have to be made, or advisedly refused, in the case of some of the rapidly-increasing number of companies which are being dissolved under the Companies Acts. But in the present case it is not necessary to decide this question. Even if it be the law that a debt due to a corporation aggregate is extinguished by the dissolution of the corporation, I do not think that it follows that the Crown's claim fails in this case. The original assignees in the bankruptcy, and their successors in office, have from the time of the bankruptcy been entitled to the old railway shares in trust for such creditors as had been or might be admitted to proof. The bank immediately before its dissolution was not a mere creditor. It was a creditor whose claim was in proof. Its claim was no longer a mere right of action for a debt. It could no longer have maintained an action as for a debt. The debt had been, at any rate provisionally, merged in an equitable execution (*Twiss v. Massey* (1737), 1 Atk. 67, per Lord Hardwicke; Cooke's Bankrupt Laws, 4th ed. ch. 1, p. 5); and the right to sue had been replaced, not, indeed, by any particular interest in any specific chattels, but by a right to have all the assets, as and when realized, applied *pro rata* for the bank's benefit with the other creditors. This right, as it seems to me, existed as an equitable interest or chattel at the time of the dissolution, and upon the dissolution of the bank that chattel or interest was not annihilated, but continued to be existing personal property, which devolved upon the Crown as *bona vacantia* as completely as any other equitable interest. Alternatively, the case may be stated in a different way, but with the

same result. From the time of the bankruptcy a title to the shares has been vested in the bankrupts' assignees and their successors, in trust down to 1887 for the bank and the other creditors. In 1887 the bank disappeared. The assignees thereupon did not cease to hold the title to the shares, nor did they cease to hold it as trustees. Their title did not depend upon the continued existence of any particular debt or of any particular creditors, nor did it become extinct upon the extinction of particular creditors. It continued to be a title upon trust, and the Crown takes the place of the extinct *cestui que trust*. Suppose all the creditors had been corporations aggregate, and all had become dissolved, it seems clear that the assignees could not have taken the property as their own as against the Crown.

It does not seem necessary to examine minutely the provisions of the old Bankruptcy Acts, in order to determine whether the money can be regarded as unclaimed dividends belonging to the statutory fund. If the proof is to stand good for the Crown's benefit, that is another way of saying that the moneys are not unclaimed dividends. If, on the other hand, the proof ought to be expunged, on the ground that the creditor and the creditor's claim are absolutely extinguished, then the case must be the same as if the proof had never been admitted, and the money ought to be divided amongst the other creditors. Unclaimed dividend seems to me to mean dividend which has been declared upon admitted and existing proofs, but which the persons entitled to it neglect to claim; it supposes the existence of some one who could claim and who omits to claim. Here the dividend belongs either to the Crown or to the other creditors, and it is claimed, and therefore it is not unclaimed dividend.

For these reasons we think that the appeal must be allowed. The costs of all parties, here and below, will be allowed out of the fund.

Appeal allowed. Leave to appeal.

SECTION III.

*Rights and Remedies of Creditors in Cases of Consolidation, Merger, or Transfer of Assets to another Corporation.*HURD v. NEW YORK AND COMMERCIAL STEAM
LAUNDRY CO.1901. 167 *New York*, 89.¹

THE defendant company was incorporated Nov. 3, 1890. Thereupon a corporation referred to as the Commercial Company and an unincorporated concern referred to as the New York Company were consolidated with the defendant corporation; and the business previously conducted by the two former companies was taken over and continued by the defendant. April 30, 1891, the plant and machinery of the Commercial Company, valued at \$20,000, were transferred to the defendant for a consideration of \$20,000, to be paid in the capital stock of the defendant corporation, which was ultimately to be distributed among the stockholders of the Commercial Company. This transfer of the plant and machinery of the Commercial Company was not made in the usual course of business. The effect of such transfer was to terminate the regular business of that company, and it was made and accepted by the defendant for that purpose.

Prior to the so-called consolidation the Commercial Company was indebted to Eliza N. Hall on a disputed claim, upon which judgment was obtained against that company, on Aug. 9, 1893, for \$4,381.16. Execution issued thereon was returned unsatisfied. Thereafter an action was brought by Hall, as judgment creditor, against the Commercial Company for the sequestration of its property, and a judgment was had therein appointing the present plaintiff receiver of said company. This action is brought by the plaintiff, as such receiver, to compel an accounting by the defendant as to the assets received by it from the Commercial Company and to recover a money judgment.

The foregoing are a portion of the facts found by the trial court, upon which it predicated the legal conclusions that the transfer by the Commercial Company was fraudulent and void against its creditors and against the plaintiff; also that the defendant corporation was chargeable with notice of the existence of the claim of Hall and took the assets of the Commercial Company charged with all its debts.

The trial court directed judgment in favor of the plaintiff for the amount of the Hall judgment and costs. This judgment was reversed in the Appellate Division by a divided court. Plaintiff appealed.

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

Edwin C. Dusenbury, for appellant.

W. W. Westervelt and *Delos McCurdy*, for respondent.

WERNER, J.

Stripped of all speculations and assumptions we have here the case of a corporation which is in debt. While so indebted its officers enter into an agreement under which substantially all of its assets are transferred to another corporation which is thereafter to continue the business. In payment of this transfer the purchasing corporation issues some of its capital stock, not to the selling corporation, nor yet to its officers as trustees, but to the principal stockholder as an individual. When the creditor undertakes to assert his rights the stock is reissued to the late treasurer of the selling corporation, who has become the president of the purchasing corporation, and he distributes the same without regard to the claims of creditors. This is the transaction which is sought to be defended under the authority of *H. & G. M. Co. v. H. & W. M. Co.* (127 N. Y. 252). A mere glance at that case will suffice to emphasize the difference between it and the case at bar. There the question was, primarily, whether the plaintiff could recover upon a promissory note which it took in payment for stock of the defendant corporation, in consideration of the transfer to the latter of the rolling mill, machinery, etc., of the former, and, incidentally, whether the taking of this stock was *ultra vires* under a charter which provided that "it shall be unlawful for such company to use any of its funds in the purchase of any stock in any other corporation." (Laws 1848, chap. 40, sec. 8.) It was held that the plaintiff could recover, as the transaction was not *ultra vires*, because the statute did not forbid the taking of stock in payment of a debt, and also, that if it were *ultra vires* the defendants were in no position to interpose a plea. The statement in the opinion in that case, to the effect that a corporation has power, with the consent of all of its stockholders, to sell its plant to another corporation and to retire from business, taking payment in the stock of the other corporation, was entirely correct as qualified by the facts before the court. No rights of creditors intervened, the stockholders had all consented, and the question arose between the parties to a promissory note given for some of the stock. Here we have an entirely different condition of things. The stockholders consent but the creditor objects. When he demands payment of his claim he is referred to the empty shell which is all that is left of the live corporation whose tangible assets constituted a trust fund for the payment of his debt at the time of its creation. When he seeks to follow this fund he is told that the capital stock of the defendant in the hands of those who may be *bona fide* holders is his only resort. This is not the law. In the recent case of *Cole v. M. I. Co.* (133 N. Y. 164) this court decided that a transaction similar to the one under review was illegal as against creditors. In that case the plaintiff was a creditor of the

National Mining Company. During the pendency of an action to establish the claim of the former the latter transferred all its property and assets to the defendant, the Millerton Iron Company, which promptly executed a mortgage covering all of its property, so that when the plaintiff obtained his judgment and issued his execution he found nothing to levy upon. In that case the defendant trust company, which took the mortgage in good faith and, therefore, occupied a much better position than the defendant herein, appealed to this court from the order of the Appellate Division reversing the judgment dismissing the complaint. In dismissing the rights of the parties, Judge Finch, speaking for this court, said: "As against the creditor the transfer to the Millerton Company was illegal and in fraud of his rights. The assets of a corporation are a trust fund for the payment of its debts, upon which the creditors have an equitable lien, both as against stockholders and all transferees, except those purchasing in good faith and for value. (*Bartlett v. Drew*, 57 N. Y. 587; *Brum v. M. M. Ins. Co.*, 16 Fed. Rep. 143; Morawetz on Corp. sec. 791.) The Millerton Company was not such a purchaser. It parted with nothing. It knew and participated in the illegal purpose to destroy the National Company, to make it utterly insolvent, and to deprive its creditors of the trust fund upon which they had the right to rely, and so they were at liberty to set aside the transfer so far as it barred their remedy, and to enforce their equitable lien upon the property in the hands of the transferee." The only difference between the transferee in that case and in this, is that there it gave up nothing except its promise to pay the indebtedness of the transferer, and here it gave up stock, not to the transferer, but to an individual stockholder who did not undertake to pay the corporate debts. Neither became a purchaser for value under such circumstances. Other authorities might be referred to in support of the position above outlined, but the case just cited is so directly in point that a further discussion seems useless.

The order of the Appellate Division should be reversed and the judgment of the Special Term affirmed, with costs in all courts.

Ordered accordingly.

EWING v. COMPOSITE BRAKE SHOE CO.

1897. 169 *Massachusetts*, 72.

CONTRACT, in two counts, upon a special promise and upon an account annexed. Trial in the Superior Court, before *Lilley, J.*, who, at the defendant's request, ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant;

and the plaintiff alleged exceptions. The facts sufficiently appear in the opinion.

W. R. Bigelow, for the plaintiff.

C. A. Taber, (*E. E. Kent* with him,) for the defendant.

LATHROP, J. The plaintiff was a creditor of a Maine corporation to the amount of \$787. This corporation ceased to do business, and the stockholders, together with at least one other person, formed a new corporation with a different name under the laws of Massachusetts. The new corporation is the defendant in this case. It took all the assets of the old corporation except its books, but it did not assume to pay all of the debts of the old corporation, although there was evidence that one Whitcomb, who was the manager of both of the corporations, told the plaintiff that the new company would be liable for the debts of the old. It is obvious, however, that where a new corporation is formed, the creditors of the old corporation do not, without something further being done, become creditors of the new corporation. They have an equitable right to follow the assets of the old corporation; but they cannot maintain an action at law against the new corporation, for there is no privity of contract. To render the new corporation liable there must be a new contract made, such as will amount to a novation. See *Moraw. Corp.* (2d ed.) §§ 808 *et seq.*

If a new contract is made between a creditor of the old corporation and the new corporation, the latter is liable only on the new contract. In the case at bar, according to the plaintiff's testimony, the new contract which he made with the manager was that he should receive two hundred dollars in cash and five shares of the capital stock of the new corporation at the par value of one hundred dollars a share, in full payment of his claim of seven hundred and eighty-seven dollars. He received the money and a certificate of five shares of the capital stock. He now seeks to rescind the new agreement, on the ground that the capital stock of the new corporation was not fully paid in before it began business. But even if this is so, he cannot hold the new corporation for the original debt, as it never contracted to pay it, except in the manner in which the agreement has been performed.

[Remainder of opinion omitted.]

Exceptions overruled.

NEW BEDFORD R. CO. v. OLD COLONY R. CO.

1876. 120 *Massachusetts*, 397.¹

COLT, J. The St. of 1874, c. 55, authorizes the defendant corporation "to purchase the rights, franchise, and property of the Middleborough and Taunton Railroad Corporation," and gives to the latter

¹ Statement omitted. — *ED.*

corporation, upon such purchase, power to convey to the Old Colony Railroad Company, "its franchises and property, and all the rights, easements, privileges, and powers granted to it." It also declares that upon such conveyance the defendant corporation shall "have and enjoy all the rights, powers, privileges, easements, franchises and property of said Middleborough and Taunton Railroad Corporation, and be subject to all the duties, liabilities, obligations, and restrictions to which said last named corporation may be subject."

This action is to recover damages for a tortious act of the Middleborough and Taunton Railroad Corporation, for which it was liable previously to the time of the purchase; and the questions raised by the demurrer are, whether the defendant is liable for that act, and, if so, whether an action can be maintained directly against it, or must be first brought against the other corporation.

The answer to these questions depends upon the intention of the Legislature, to be deduced from the terms of the statute and the manifest purpose of the act. The language is broad enough to place the defendant in all respects in the position of the other corporation, upon the conveyance and assignment provided for. It is equivalent to an amalgamation of the two; all the franchises, privileges, and powers are transferred, without reservation; not merely the franchise to own and manage a railroad, but the franchise of being a body politic, with rights of succession, of acquiring, holding, and conveying property, and of suing and being sued by its corporate name. It puts out of the reach of creditors all property liable to attachment to satisfy claims, either in contract or tort. It practically terminates the corporate existence of the selling corporation, except, perhaps, so far as such existence may be necessary in order to hold and distribute the consideration received for the sale, or to meet the requirements of the statute which prolongs the life of all corporations for three years after dissolution, for the purpose of enabling them to close their concerns. Gen. Sts. c. 68, § 36. It operates as a dissolution of the corporation by force of the statute and of the assent manifested by the sale. *Lauman v. Lebanon Valley Railroad*, 32 Penn. St. 42.

In view of these results, it would be a narrow construction to hold that when the statute subjects the purchasing corporation "to all the duties, liabilities, obligations, and restrictions" of the other, it only intended to impose those obligations which the corporation owed the public under its charter and the laws of the Commonwealth, and that the property transferred was only that by which it served the public in the exercise of its franchise. In the absence of express provision, it cannot be inferred that it was the intention of the act to impair claims of third parties for existing liabilities, or to shorten the time within which the remedy must be pursued. The question is not whether the statute compels the creditor to accept the defendant corporation as a new debtor against his will, or an injured person to resort to a stranger for satisfaction, but whether it empowers the

creditor or the person injured to resort, if he chooses, in the first instance, to the corporation which, by the terms of the statute, is made liable to him. And we are of opinion that it does, and that the privity necessary to support this action is created by the statute and the purchase and conveyance under it.

Demurrer overruled.

INDIANAPOLIS, CINCINNATI AND LAFAYETTE R. CO.
v. JONES.

1868. 29 *Indiana*, 465.

APPEAL from the *Decatur* Common Pleas.

FRAZER, J. — This case is here solely upon a question of the sufficiency of the evidence. It was a suit to recover the value of a steer, alleged to have been killed by defendant's cars, in *April*, 1865, in *Decatur* county, the railroad not being fenced. The answer was the general denial. The issue was found for the plaintiff, and his damages assessed at \$100. The question made is without any substantial merit, being purely technical. It must, however, be determined according to law. It was the cars of the *Indianapolis and Cincinnati Railroad Company* that killed the steer, since which time that company's road has been consolidated with the road of the *Lafayette and Indianapolis Railroad Company*, under the laws of this State, and the corporation thus formed is the appellant, the *Indianapolis, Cincinnati and Lafayette Railroad Company*.

It is disputed that the consolidated company, the appellant, is liable for the value of the steer, and *Evansville v. The Evansville Gas Light Co.*, 26 Ind. 447, is relied on as an authority to sustain the proposition. The case seems to us to have no bearing whatever upon the question.

By the consolidation, both of the old companies ceased to exist separately, and all their effects and franchises were vested in the new company. The two corporations became merged in one. We cannot imagine how the *Indianapolis and Cincinnati Railroad Company* could afterwards be sued. Upon whom would process be served? It ceased to have any officers or agents. It ceased to be a separate legal entity. Instead of two, there was now but one corporation, made up of the mingled elements of the two pre-existing companies, so combined and merged that neither could be separately identified or brought into court. But what are the rights of creditors and persons upon whom torts have been committed by the vanished corporations? A dead man may have an administrator to represent his estate and answer to suits, but a corporation lawfully disappearing thus, has no estate to be administered. Its assets have lawfully vested in the new consolidated corporation. Must lawful claims be lost, then? That result cannot follow. The legislature has chosen to make no

provision upon the subject, and the industry of counsel, as well as our own examination of the books, has failed to discover any direct authority upon the question before us. The analogies of the law, too, afford little aid in its solution. We regret to be compelled to decide it without a more thorough argument. Giving it, however, the best consideration of which we are capable under the circumstances, we have reached the conclusion that, for the purposes of answering for the liabilities of the constituent corporations, the consolidated company should be deemed to be merely the same as each of its constituents, their existence continued in it, under the new form and name, their liabilities still existing as before, and capable of enforcement against the new company in the same way as if no change had occurred in its organization or name. This doctrine seems to spring from the necessities of justice, and, so far as we are able to foresee, cannot result in wrong or embarrassment. To avoid variance in proof, the complaint should, in this case, have averred the facts, which it did not; but it seems to us that it could have been cured by amendment on the trial, and that the variance is therefore not available to the appellant here.

The judgment is affirmed, with ten per cent. damages and costs.

VILAS v. MILWAUKEE & PRAIRIE DU CHIEN R. CO.

1863. 17 *Wisconsin*, 497.

APPEAL from the Circuit Court for *Dane* County.

In July, 1856, the Milwaukee & Mississippi Railroad Company became liable, upon contract, to pay the plaintiff ten shares of its full paid stock, in consideration of the plaintiff's having caused certain lands in Prairie du Chien in this state, of which he claimed to be the equitable owner, to be conveyed to said company by the persons who held the legal title to them. The stock was never paid to him, though demanded of said company in May, 1857. At the time it became due, and at the time of such demand, the value of said stock was \$810. In January, 1861, by virtue of chapter 308, General Laws of 1860, certain persons who had before then purchased the road of the said Milwaukee & Miss. R. R. Co., filed, in the office of the secretary of state of this state, a certificate, signed by them, specifying, among other things, that they formed a corporation by the name of the *Milwaukee & Prairie du Chien Railway Company*, and that as such they were authorized to purchase and hold the franchises of said Milwaukee and Miss. R. R. Co.; and thereby said *Milwaukee & Prairie du Chien Railway Company* became, and have ever since been, a body politic and corporate by that name. The complaint alleges that said company (which is the defendant in this action) subsequently acquired, by purchase or otherwise, and has ever since owned and exer-

cised all the franchises of said Mil. & Miss. R. R. Co., and that it has been and is the same corporation, and liable to pay all demands existing against said last named company. Judgment is therefore demanded against the defendant for said sum of \$810, with interest, &c.

The answer denied, among other things, the liability of the defendant to pay demands against the Milwaukee & Mississippi Railroad company, and denied any liability to pay the plaintiff's demand.

On the trial, the plaintiff, against the objections of the defendant, introduced evidence tending to show the liability of the Milwaukee & Mississippi Railroad Company to him as averred in the complaint: and also the value of the stock therein mentioned. The defendant moved for a nonsuit, on the ground that no cause of action against it had been shown. Motion denied. Defendant then introduced evidence, showing, among other things, that it was organized and incorporated in accordance with the statute, by persons who had purchased the road, franchises, and other property of the said Milwaukee & Mississippi Railroad Company at mortgage sales thereof, under decrees in the United States court for the district of Wisconsin. The court instructed the jury that if the plaintiff had proved the allegations of his complaint, he was entitled to recover the value of the stock therein mentioned. Verdict for the plaintiff; motion for a new trial denied; and judgment upon the verdict; from which the defendant appealed.

Finches, Lynde & Miller, for appellant.

Wakeleys & Vilas, for respondent.

Sec. 1, chap. 121, Laws of 1856, after providing for the sale of railroads under mortgages, says: "Thereupon the party or parties acquiring title under any such sale, and their associates, successors, and assigns, shall have and acquire thereby, and shall exercise and enjoy thereafter, *all and the same* rights, privileges, grants, franchises, immunities, and advantages . . . which belonged to and were enjoyed by the company making such deed or mortgage, &c., and may conduct their business generally *under* and in the manner provided in the *charter of such railroad company*," &c. Sec. 1, chap. 308, Laws of 1860, providing especially for the organization of the defendant, says: "And the said corporation shall possess all the privileges, powers, authorities, and capacities acquired by the said purchaser or purchasers, *or possessed* by the Milwaukee & Mississippi Railroad Company, *by virtue of the charter of said company*, and of any law of this state." Is it not plain that by these provisions everything which was granted and conferred by the original charter is transferred to the present company? If it be possible for the legislature to transfer the corporate powers as a whole — the corporation itself — from the original corporators to the present, in what more definite and appropriate language could it have been done? They do not grant to such persons as shall purchase, &c., new and original corporate powers *such as* or *similar* to those conferred on the Milwaukee & Mississippi

Railroad Company, but "*all and the same rights,*" &c. The corporation "*may conduct their business . . . under . . . the charter*" of the old company; and, by the act of 1860, the defendant is to "*possess all the privileges, &c., possessed by the Milwaukee & Mississippi Railroad Company . . . by virtue of*" its charter. Under these provisions is not the Milwaukee & Prairie du Chien Railway Company existing, operating, and doing business *under* and by *virtue* of the original charter (and amendments) of the Milwaukee & Mississippi Railroad Co.? Has it any other charter?

So far as liability for old debts is concerned, it is wholly immaterial whether the corporate existence passes into the hands of new corporators by purchase, by mortgage liens, or by transfer without consideration. The purchaser from the corporation may take and hold its property as a purchaser merely. If he stops there, he incurs no liability. If he takes only such things—such franchises as the corporation may sell and still remain a corporation—he is a mere purchaser. But if he chooses to take a transfer to himself of all the corporate rights—of the corporate existence—he is in the same position as if he were not a purchaser and had taken such a transfer.

PAINÉ, J. It seems to us almost too plain for argument that this action cannot be sustained. The plaintiff was a creditor of the Milwaukee & Mississippi Railroad Company. The road and property of that company were sold on a mortgage, and the purchasers organized the company which is the defendant in this suit, in pursuance of the provisions of chapter 121, Laws of 1856. The question is, whether this company, organized under that law by the purchasers at the mortgage sale, is liable for all the debts of the old company whose property they purchased?

The counsel for the respondent concedes that it would be absurd to claim that a purchaser of property sold on a mortgage became liable to pay the general debts of the original owner. But he seizes upon the provisions of the law of 1856, giving to the new company all the rights and powers of the old, as a foundation upon which to base the claim that the whole effect of such a proceeding is merely to work a change in the name of the old corporation, and then to apply the familiar principle that a corporation remains liable for its debts through all its changes. The fallacy of this argument consists in the assumption that because the new corporation is clothed with the same powers as the old, therefore it is the same corporation. Such a conclusion could only be arrived at by resolutely shutting the eyes to the entire scope and object of a railroad mortgage and a sale and purchase under it in pursuance of the law of 1856.

The object of that law was to enable railroad companies to borrow money, and to mortgage their property and franchises as security. To give full and perfect effect to such mortgages as securities was the

leading idea of the law. To accomplish it, the company was authorized to mortgage its franchises, and, for the purpose of removing all doubt, it was further expressly provided that the purchasers at a mortgage sale might organize anew, and be invested with all the rights and powers of the old company in the management of the road and business. Without some such provision, a purchase of the property would be unavailing. The "same" powers are conferred, not with a view to a continuation of the same corporation, but to give full effect and protection to rights created by the mortgage, adverse to those of the old corporation. To say, therefore, that because the purchasers have the same powers they are in effect the same corporation, would be to defeat the primary object of the law, and to destroy the interests of the mortgagee. His interests, and all the proceedings to protect those interests, are adverse to the original corporation. And it is this adverse character which excludes the idea that the proceeding has no other effect than merely to continue the old corporation, and which so plainly distinguishes the case from those mere changes of corporate names or powers where the principle relied on by the plaintiff has been held applicable, that it is difficult to imagine that they could ever have been confounded.

The law shows plainly that it was intended that such mortgages should have effect, like other mortgages, according to their priority, and it certainly would have been idle to expect to obtain loans upon such securities if it had been otherwise. Yet the doctrine here contended for would destroy all priority, and the purchaser under the prior mortgage would take the property and franchises of the company, with a liability to pay not only the subsequent mortgages but all its unsecured debts.

The judgment is reversed, with costs, and the cause remanded for a new trial.

CHAPTER XXII.

POWER OF AN INSOLVENT CORPORATION TO PREFER
PARTICULAR CREDITORS.

CATLIN v. EAGLE BANK.

1826. 6 Conn. 233.¹

THIS was a bill in chancery.

The *Eagle Bank* is a corporation, established, by an act of the legislature, in *October*, 1811, for banking purposes, with the usual powers of such an institution; the charter being, at all times, subject to alteration, amendment or revocation, by the General Assembly.² The plaintiff is a creditor of this corporation to the amount of between 90,000 and 100,000 dollars. The bank, on the 15th *September*, 1825, failed, and was in fact insolvent. Among its creditors was *The Savings Bank of New-Haven*, a corporation, empowered to receive deposits from individuals, for safe-keeping and management, and obliged to pay the depositors the interest or profits that should accrue. This institution had deposited with the *Eagle Bank*, at an interest of four *per cent.* and to be returned on demand, all the money, which it had received, in small sums, from a great multitude of depositors, amounting to between 80,000 and 90,000 dollars. In payment and security of this demand, the directors of the *Eagle Bank*, after its actual insolvency, mortgaged to the *Savings Bank* real estate worth about 20,000 dollars paid to *Samuel J. Hitchcock*, Esq. secretary of the *Savings Bank*, about 15,000 dollars in money, and assigned to him sundry negotiable promissory notes, to the amount of about 52,000 dollars. The bill prayed, that these conveyances might be set aside, and that all the funds of the *Eagle Bank*, at the time of its failure, might be equitably distributed among its creditors, in proportion to their respective claims.

The case was reserved for the advice of this Court.

Sherman and *R. S. Baldwin*, for plaintiff.

N. Smith and *Hitchcock*, for defendants.

¹ Arguments omitted. — Ed.

² See the charter in the printed *Statutes*, previous to the revision of 1821, *book 2*, page 65.

HOSMER, Ch. J. It is an undoubted principle, that the powers of a corporation are solely derived from its charter, which is the law of its nature; and that it is invested with such powers only, as are expressly delegated, or which are necessary, to carry the express delegations into effect. *The New-York Firemen Insurance Company v. Ely & al.*, 5 Conn. Rep. 560. By the act of incorporation, the *Eagle Bank* had authority to purchase, hold and convey property, with the usual banking powers superadded; and the directors of the bank were authorized to dispose of and manage its monies, credits and property, and to regulate its concerns, in all cases, not specially provided for. To this general grant, in relation to the rights, privileges and duration of the bank, there is neither exception nor limitation, save that the charter is alterable, amendable, and revocable, at the pleasure of the legislature. It results, undeniably, that the rights, powers and duties of the bank, so far as they depend on the act of incorporation, remain unchanged, until it is revoked, and independent of its actual solvency or insolvency. The general laws of the land, or the principles which guide this Court, as a court of chancery, may make a difference on this subject; but setting aside these considerations, and admitting the operation of the charter exclusively, the bank is authorized to exercise the same powers, at all times, without reference to its condition.

Whether the directors of the corporation, after it has become actually insolvent, can make payment or give security to one of its creditors, and leave another unpaid and without security, is the general question to be determined. It has been contended, in behalf of the plaintiff, with no inconsiderable ingenuity, that the legislature intended to render the corporation at all times a trustee for the creditors. This suggestion is too unfounded, and too destitute of practical importance, to be admitted or discussed. Such a principle, during the solvency of the bank, must be dormant and useless; and neither the charter, nor the nature of the case, furnishes any warrant for the supposition.

If the corporation, so far as regards its right to manage and dispose of its property, has power analogous with that which is vested in an individual, the plaintiff's bill is wholly destitute of merits. An individual debtor, who is actually insolvent, may prefer one creditor to another, unless in certain cases under the bankrupt laws; and to do this, as was said by Lord *Kenyon*, is neither illegal nor immoral. We have no bankrupt system, to control the acts of the insolvent merchant; and in the absence of all legal liens, he may prefer a creditor, if the act is done in good faith. To discuss the reasons of the rule is unnecessary. It is sufficient to say to those, who are not disposed to unsettle foundations, that it is firmly and uniformly established, both at law and in chancery. *Estrick v. Caillaud*, 5 Term Rep. 420. *Nunn v. Wilmore*, 8 Term Rep. 521. *Hopkins v. Gray*, 7 Mod. Rep. 139. *Meux & al. v. Howell & al.*, 4 East, 1. *McMenomy & al. v. Ferrers*, 3 Johns. Rep. 84. *Willes & al. v. Ferris*, 5 Johns. Rep. 344. *Small v. Oudley*, 2 P. Wms. 427. *Cock v. Goodfellow*, 10 Mod. Rep. 489. *Phoenix v.*

Assignees of *Ingraham*, 5 *Johns. Rep.* 412, 426, 427. *Hendrick v. Robinson*, 2 *Johns. Ch. Rep.* 283.¹ The same rule is equally applicable to partners; and what is a banking corporation, in the essence, but a partnership authorised by a special act of the legislature? *Gow on Part.* 234. It is an *artificial person*; and this denomination is given to it, by reason of its resemblance to a natural person, in respect of its powers, rights and legal duties. It is difficult for me to conceive, where no restraint is interposed, in a charter of incorporation, on what ground, the general authority delegated is subjected to exceptions, or fettered by restrictions, from which an individual and a mercantile company are free. And this difficulty is much increased; as no case intimating this diversity between corporations and individuals, has been cited, nor can be found, by my utmost researches. Where no legal lien has been obtained, it is a reasonable supposition, that the relation of creditor and debtor, must, in all cases, infer the same consequences; and that where the same mischief exists, there is the same law. The cases of an individual and of a corporation, in the matter under discussion, it appears to me, are not merely analogous, but identical; and I discern no reason, for the slightest difference between them. There exists no doubt, that there have been many instances of actually insolvent corporations, where certain creditors have been preferred to others; and the perfect silence until now, on the subject of this fancied diversity, is powerful to show what has been the universal opinion.

It however has been insisted for the plaintiff, that on the actual insolvency of the bank, the corporation were the *trustees* of the creditors; and if this be true, the latter become the *cestuy que trusts* of all the corporate estate. The consequence, on this supposition, would be, that all persons coming into possession of the bank property, with notice of the trust, must be considered as trustees. *Daniels v. Davison*, 16 *Ves. jun.* 249. *Moore v. Butler*, 1 *Scho. & Lef.* 262. No express trust was created, on the happening of the bank's insolvency; but the charter on every fair principle of construction, conferred on the corporation the entire control of its property, as well after as before this event.

It however has been imagined, that the trusts arose by operation of law. I enquire of what law? No principle, or case, or analogy has been referred to, that supports the proposition; nor am I capable of conceiving any. The insolvent banking corporation is just as much a trustee of the creditors, and no more, as the insolvent individual is the

¹ See also *Ingraham v. Wheeler*, *post*, 277, 284. *Spring v. South Carolina Insur. Co.* 8 *Wheat.* 268. *Brooks v. Marbury*, 11 *Wheat.* 78. *Brashear v. West*, 7 *Pet.* 608. *United States v. King, Wallace*, 21. *Richards v. Hazzard*, 1 *Stew. & Port.* 139. *Harman v. Reese*, 1 *Browne*, 11. *Linpincott v. Barker*, 2 *Binn.* 186. *Hickley v. Farmers &c. Bank*, 5 *Gill & Johns.* 377. *Cameron v. Montgomery*, 13 *Serg. & R.* 132. *Pierpoint v. Graham*, 4 *Wash. C. C.* 232. *Hatch v. Smith*, 5 *Mass.* 42, 49. *Widgery v. Haskell*, *Id.* 144, 153. *Stevens v. Bell*, 6 *Mass.* 339, 342. *Robinson v. Rapelye*, 2 *Stew.* 86. *Murray v. Riggs*, 15 *Johns. R.* 571, 583, 4, 5. *Grover v. Wakeman*, 11 *Wend.* 187. *Tilloy v. Britton*, 4 *Halst.* 121. *Haven v. Richardson*, 5 *N. Hamp.* 113. *Howell v. Edgar*, 3 *Scam.* 417. *Williams v. Jones*, 2 *Ala.* 314.

trustee of his creditors. The relation of creditor and debtor exists in both cases; but from this relation no trust arises. Undoubtedly, in all cases of actual insolvency, the creditor would derive security from this doctrine; and often great losses might be prevented. But the interest of the insolvent person is not to be entirely disregarded. His creditor has voluntarily become such, with full knowledge, that his security must very much depend on the integrity of his debtor. With open eyes he has given credit; and the public charter of the corporation has instructed him in all the powers and rights of the corporation. Now, it would be a very harsh and inequitable doctrine, but on the plaintiff's claim, it is inevitable, that the moment a banking institution is unable to pay all its debts, the directors of the bank may not issue a bank bill, dispose of bank property, make payment of a single debt, or perform one bank operation. May not an individual, or mercantile company, under the same circumstances, proceed in the usual train of business? This is not disputed. It is the law of chancery, that they may prefer one creditor to another; and this, on a principle of analogy, refutes, entirely, the supposition of a trust in this case. The novelty and unfoundness of the plaintiff's claim are such, that it is difficult to support, or even to oppose it, without taking leave of every established principle, and beating the air. That the directors of the *Eagle Bank* are trustees, I admit; but they are the trustees of the stockholders. The stockholders are the *cestuy que trusts*, and the charge of breach of trust must come from them. *The Attorney General v. The Utica Insurance Company*, 2 Johns. Ch. Rep. 371, 385.

The funds of the corporation, after its insolvency, have been called *equitable assets*; but the name was wholly misapplied. Equitable assets, generally speaking, are such as the debtor has made subject to his debts generally, that would not thus be subjected without his act; (2 Fonb. Eq. 402, n. d.) and which can be reached only by the aid of a court of equity. They are divisible among the creditors, as all property is, when placed under the jurisdiction of a court of chancery, *pari passu*, in ratable proportions. *Riggs & al. v. Murray & al.*, 2 Johns. Ch. Rep. 565, 577. But they must be assets, or they cannot be equitable assets; and this term does not express the nature of property, in the hands of an individual, partnership or corporation actually insolvent. On the estate of such persons, there is no equitable lien to interrupt the free progress of their business, or prevent the fair disposition of their property. The case of *Benson v. LeRoy*, 4 Johns. Ch. Rep. 651, cited for the plaintiff, illustrates the principles advanced. It proves only, that a devise of an estate to trustees, in trust to pay debts, and distribute the residue, places the assets under the jurisdiction of the court. Undoubtedly, it does; for by the express appointment of the devisee, the estate was a trust estate.

There is a class of cases, in which chancery has exercised a control over corporations, in relation to breaches of trust; but in such cases, the jurisdiction has alone been extended to *charitable* institutions.

Shaw v. Cunliffe, 4 Bro. Ch. Rep. 145. *Ball v. Montgomery*, 2 Ves. jun. 199. In *The King v. Watson & al.*, 2 Term Rep. 199, the court, however, intimated, without discussion, if any corporation misapplied monies, that it was an abuse of trust, which might be the subject of application to the court of chancery. This case has been doubted, by Lord Eldon, in *Attorney General v. Carmarthen, Coop. Eq. Rep.* 30, and in commenting upon it, it was observed, by the late Chancellor Kent, that the chancery cases do not recognize any such general jurisdiction. *Attorney General v. Utica Insurance Co.* 2 Johns. Ch. Rep. 384. In the case of *Adley v. The Whitstable Company*, 7 Ves. jun. 315, Lord Eldon, with hesitancy, admitted a jurisdiction in equity against a corporation, by ordering an account of profits, when, by an illegal by-law, the plaintiff was excluded from a share of them. This, it will be observed, was merely an equitable interposition, between the persons interested in certain profits, and does not at all support the principle, that chancery, in behalf of a creditor, will take cognizance of corporate funds misapplied. In *Vose v. Grant*, 15 Mass. Rep. 505, an action on the case was brought by a bill-holder, to recover a sum of money of the defendant, as a stockholder and director of a bank; the stockholders of the bank having divided their capital stock among themselves, so that the corporate funds were insufficient to redeem the outstanding notes and bills. The action was not sustained, by the court; and in giving his opinion, it was said by Jackson, J., that a court of chancery would probably give relief against the stockholders. This *obiter dictum* of a learned judge, on a point not made or discussed, and without the citation of principle or case, was not intended to express any thing more, than the first impression of his mind; and this is clearly manifested by the word "probably," with which the intimation was accompanied. On the other hand, in the *Attorney-General v. The Corporation of Carmarthen, Coop. Eq. Rep.* 30, the jurisdiction was denied, by the chancellor, in the very case of a misapplication of funds. And in the *Mayor and Commonalty of Colchester v. Lowton*, 1 Ves. & Bea. 226, Lord Eldon held, that there was no instance of a trust attaching, upon the ground of a misapplication of funds by corporations, except in the case of corporations holding to *charitable* uses.

From this discussion it is unquestionable, that the jurisdiction of chancery does not extend to the disposal of the corporation estate or funds of the *Eagle Bank*. More time has been occupied in the examination of the principle, than perhaps can be justified, as it has no application to the case before us. The bank has, in no proper sense, misapplied its funds. It has done what it had a right to do, and what is uncontrollable by this Court; that is, it has preferred to pay and secure the claim of what was considered a meritorious creditor. Of its creditors, the corporation was not a trustee; they had no lien upon its funds; and no case is made out, entitling the plaintiff to relief, or showing any jurisdiction exercisable by this Court.

The plaintiff's bill must be dismissed.

BRAINARD and LANMAN, Js. were of the same opinion.

PETERS, J. being interested in the question, and DAGGETT, J. having been of counsel in the cause, gave no opinion.

Bill to be dismissed.

ROUSE v. MERCHANTS' NATIONAL BANK.

1889. 46 Ohio State, 493.¹

WILLIAMS, J. The general question for decision in this case, is, whether a corporation for profit, organized under the laws of this state, can, in the disposition of the corporate property, after it has become insolvent, and ceased to further prosecute the objects for which it was created, prefer some of its creditors over others.

The corporate powers, business and property of the corporation, must be exercised, conducted and controlled by a board of directors, all of whom must be stockholders; and, as a still further guarantee for creditors, the powers of corporations over their property, its use and disposition, are so circumscribed by positive statute that no corporation can employ its stock, means, assets or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation. The extent of the powers expressly conferred on them are, to sue and be sued, contract and be contracted with, and acquire and convey such real and personal estate as may be necessary or convenient to carry into effect the objects of the corporation, to make and use a common seal, and do all needful acts to carry into effect the objects for which they are created. It is obvious, that the corporate property cannot with propriety be said to be owned by the corporation, in the sense of ownership as applied to property belonging to natural persons. The latter may without restriction, acquire and dispose of property for any lawful purpose, while both the power of acquisition and disposition of the former, are limited to the special objects already mentioned. The corporate property is in reality a fund set apart to be used only in the attainment of the objects for which the corporation was created, and it cannot lawfully be diverted to any other purpose. As soon as acquired, it becomes impressed with the character of a trust fund for that purpose, and the shareholder or creditor may interpose to prevent its diversion from the objects of the incorporation, injurious to him. Taylor on Private Corporations, sec. 34.

But, it is the right of the creditors, equally with the shareholders,

¹ Statement and arguments omitted; also part of opinion. — Ed.

to have the corporate property applied to the purposes for which the corporation was created, and this includes the payment of the corporate indebtedness contracted in the prosecution of its business. The rights of the creditors to the corporate property, so far as it is necessary to meet their demands, are superior to those of stockholders.

It is now firmly established, that the property and assets of a corporation are a trust fund for the payment of its debts, especially in case of its insolvency.

It being established that the corporate property is a trust fund for the benefit of the corporate creditors, it follows, that after the insolvency of the corporation is ascertained, and the objects of its creation are no longer pursued, the managing board of directors then having the custody of the property, become trustees thereof for the creditors; and this relation necessarily forbids any discrimination between the beneficiaries, in the distribution or application of the fund. The due execution of the trust demands absolute impartiality toward the *cestuis que trustent*. They must be treated alike, and no preference can be made among them, without a direct violation of the duties arising from the relation. It would seem clear, that, if the corporate property constitutes a fund for the creditors, it is as much so for one creditor as for another, and that the directors in possession, are without authority to dispose of it in disregard of the rights of any creditor. They can no more discriminate between creditors in such case, than they could, before the insolvency of the corporation, between the shareholders.

Mr. Morawetz, in his excellent work on private corporations, referring to the cases which hold that corporate preferences are valid, says: "This doctrine, in the opinion of the writer, is wholly indefensible on principle. The capital provided for the security of the creditors of a corporation is a fund held for the benefit of all the creditors equally. That the unsecured creditors of a corporation are entitled to an equal distribution of the common security, has often been recognized by the courts of equity in adjusting the rights of creditors among themselves, and in relation to the company's shareholders. After a corporation has become insolvent, and has ceased to carry on business, the rights of its creditors become fixed. If a corporation, whose assets are not sufficient to satisfy all of its creditors in full, can prefer certain creditors, leaving others unpaid, this must be by virtue of a power reserved by implication to the company and its agents. But this power cannot justly be included in the general powers of management which a corporation must necessarily possess over its property, in order to carry on its business and further the purposes for which the company was formed. The purposes of corporation are not furthered in any manner, by giving it or its agents the power, after the company has become insolvent and has ceased to carry on

business, and after its shareholders have lost their interests in the corporate estate, to prefer a portion of the creditors, according to interest or mere whim, and to pay their claims in full, leaving the others wholly without redress. The doctrine that an insolvent corporation may prefer certain creditors at the expense of others, seems to have been first started in *Catlin v. Eagle Bank* (6 Conn. 233), a case in which the fundamental rule that the assets of an insolvent corporation constitute a trust fund pledged for the security of creditors was denied. It is a doctrine which is at variance with the whole theory of the law concerning the rights of creditors of insolvent corporations, and is contrary to the plainest principles of justice." (2 Morawetz, Corporations, sec. 803.)

Whether an insolvent corporation, which is still a going concern, and in good faith engaged in the prosecution of its business, may borrow money, or contract, or procure an extension of other *bona fide* indebtedness, and convey or pledge the corporate property in security thereof, is a question not involved in this case, and upon which we here express no opinion.

It appears from the finding of facts in this case, that the directors of the corporation declared its insolvency, and directed by the same resolution, the execution of an assignment for the benefit of its creditors, and of the preferential mortgages to the bank, and other creditors. It does not appear, that there had been any agreement between the mortgagees and the corporation that such mortgages should be given, nor that they were given for any other consideration than the antecedent indebtedness of the corporation to the creditors receiving them. Being merely voluntary mortgages to secure pre-existing debts, without other consideration, they cannot prevail against the equitable rights of the corporate creditors. *Lewis v. Anderson*, 20 Ohio St. 281.¹

SCHUFELDT v. SMITH.

1895. 131 *Missouri*, 280.²

IN DIVISION ONE.

APPEAL from Buchanan Circuit Court.

Suit to set aside a deed of trust executed by an insolvent corporation, in pursuance of a resolution of the directors. It was virtually

¹ In *Smith &c. Co. v. McGroarty*, 136 U. S. 237, A. D. 1890, GRAY, J., said (p. 241), that the above decision in *Rouse v. Merchants' Bank* "proceeded in part upon a theory that the property of an insolvent corporation is a trust fund for its creditors in a wider and more general sense than could be maintained upon general principles of equity jurisprudence." On this point, see *ante*, *McDonald v. Williams*, 598, pp. 599, 600; and see also *post*, chapter on "Right of Creditor to compel Payment in full for Stock." — ED.

² Statement abridged. Arguments omitted. — ED.

admitted in argument that one of the claims preferred by this deed was guaranteed by the president of the corporation, and that another preferred claim was the property of an estate of which the president was administrator. The president was one of the three directors who passed the resolution.

In the Circuit Court a decree was entered setting aside the deed of trust.

Huston & Parrish, S. S. Brown, and H. K. White, for appellants.

Dowe, Johnson & Rusk, Stauber & Crandall, W. P. Hall, and Vin-ton Pike, for respondents.

MACFARLANE, J.

The board of directors are undoubtedly trustees for the corporation and stockholders, and when acting for them are bound to exercise the utmost good faith. Any attempt in dealing with its property or affairs to secure themselves personal advantages over other stockholders should at least be subject to the most rigorous scrutiny. *Hill v. Rich Hill, etc., Co.*, 119 Mo. 9, and cases cited.

But it can not be said as a correct proposition of law that officers of a corporation cannot themselves, and in their own names, contract with it. To so hold would virtually deny to corporations the credit upon which so much of the business of the country is transacted, and which is so essential to success. If the stockholders and officers of corporations are not permitted to advance money to them, or to indorse for them, without subjecting themselves to such disadvantages, they would be deprived of their most valuable source of credit. A corporation naturally looks to those interested in its affairs for accommodations. If directors can lend the corporation money, or indorse for it, they should certainly have the same right to collect the debts or secure themselves, as is accorded to other creditors.

The cases cited abundantly show that a corporation, so long as it has control of its property, though insolvent, may, when acting honestly, prefer one creditor to another. A mortgage, then, giving such preference is not constructively fraudulent. Neither the corporation nor the other stockholders are injured by the preference given. To defeat them actual fraud should be shown. The honest debts all stand and should stand on equal footing. All the creditors should have equal rights to enter in the race of diligence. The fact that the race may be unequal should not deprive the winner of his reward. An individual debtor can prefer his family, his neighbors, and his friends. If the preferred debt is honest, the preference can not be impeached, though the wife of the debtor secure the advantage. *Hart v. Leete*, 104 Mo. 338; *Riley v. Vaughan*, 116 Mo. 176. No reason can be seen why a corporation may not also prefer its friends. There is no more equity in allowing an individual debtor to prefer his creditor wife or children, than in allowing a corporation to prefer its stockholders and officers. To permit equities to control would defeat all preferences.

While the owner of property retains the power of its disposal, he may apply it to the payment of any honest debt, is the rule upon which the right to make preferences among creditors rests. The rule should apply as well to corporations as to individuals, and any change should be made by the legislature and not by the courts. If the debt is an honest one, and the corporation had the power to contract it, it has the right to pay or secure it, and no fraud can be imputed to it from the fact that it is paid or secured in preference to another.

"It may be conceded," said Judge TART in a recent case, "that the trust relation justifies and requires courts of equity to subject preferences by an insolvent corporation of its own directors to the closest scrutiny, and places the burden upon the preferred director of showing, beyond question, that he had a *bona fide* debt against the corporation: but we do not see why, if a corporation may prefer one creditor over others, it may not prefer a director who is a *bona fide* creditor. Preferences are not based on any equitable principle. They go by favor, and as an individual may prefer, among his creditors, his friends, and relatives, so a corporation may prefer its friends." *Brown v. Furniture Co.*, 58 Fed. Rep. *loc. cit.* 292. See, also, *Worthen v. Griffith*, 28 S. W. Rep. (Ark.) 286, and cases cited.

We do not think, therefore, that the deed of trust is constructively fraudulent for the reason that it gives preferences to a director of the corporation. When the right of the corporation to give preferences to any of its creditors is conceded, the logical conclusion follows that it can give them to any creditor who holds an honest debt against it, though he be an officer or stockholder.

This conclusion is in accord with the declaration of SHERWOOD, J., in a recent case. He says: "A corporation, within the scope of the purposes for which it was incorporated, may do any act in furtherance of those purposes which an individual in similar circumstances might do, and, though insolvent, may prefer some creditors to others, even though such creditors are among the directors of the corporation." *Foster v. Planing Mill Co.*, 92 Mo. 87.

While the directors of a corporation do not sustain the strict relation of trustees for its creditors, yet their duties to them and their relation to the corporation itself are such as impose upon them some of the obligations of trustees. In dealing with the corporation they deal with themselves. They determine the liability of the corporation to themselves. They should, therefore, be required, in case they give themselves a preference over other creditors, to show that all their secured debts are fair, honest, and justly due them. This burden properly rests upon them.

From this record it appears that the invalidity of the deed of trust in question was declared to result from the mere insolvency of the corporation at the time it was executed. The question of the *bona fides* of the debts of directors, who were given preferences, was not gone into on the trial. The act of the directors in voting themselves pref-

erences would make the deed of trust *prima facie* fraudulent in fact, but not conclusively so as a matter of law. The court evidently did not decide the case upon the presumption of fact that the deed was fraudulent, which it might have indulged. We, therefore, reverse the judgment and remand the cause for a new trial. BRACE, P. J., BARCLAY, and ROBINSON, JJ., concur.

LOVE MFG. CO. v. QUEEN CITY MFG. CO.

1896. 74 *Mississippi*, 290.¹

FROM the chancery court of Lauderdale county.

HON. W. T. HOUSTON, Chancellor.

The Queen City Manufacturing Company, an insolvent corporation, executed a general assignment, by which it preferred debts due to several of the directors who were stockholders, and it also preferred debts for which two of the directors who were stockholders were bound as indorsers. The directors who were beneficiaries of the preferences voted for and caused the assignment to be made. They constituted a majority of the board, and these same persons controlled and voted more than half the stock in the stockholders' meeting which ordered the assignment made. The assignee having filed his petition, under chapter 8 of the code of 1892, in the chancery court, the Love Manufacturing Company and others, creditors of the assignor, filed their cross-petition assailing the assignment as fraudulent. This pleading presented the only question decided by the court. A demurrer thereto was sustained by the court below, and the cross-petitioners appealed.

Miller & Baskin, Brame & Alexander, and Cochran & Bozeman, for appellants.

McIntosh & McIntosh, Hamm, Witherspoon & Witherspoon, and W. R. Harper, for appellees.

COOPER, C. J. The question involved in this case, as now presented, is not whether an insolvent corporation may, in good faith, prefer creditors, or whether the mere fact that two corporations, each having the same person as president of the board of directors, and stockholders common to both, disables one to prefer the other, in good faith, as to a debt due it. These questions have been decided in this state. *Arthur v. Bank*, 9 Smed. & M., 394; *Sells v. Rosedale Grocery Co.*, 72 Miss., 590. Nor is the question what preference may be given a director by a "going" corporation, not in the presence or the prospect of insolvency, or even in that condition, if in consummation of a promise made to obtain means to go on, in just and reasonable expectation of continuing operations successfully, and that if it

¹ Arguments omitted. — Ed.

became necessary for the protection of the creditor a preference would be given him. Nor is it a question as to a stockholder dealing with a corporation. Nor is it the case of an officer who advanced money or credit to the corporation, and was preferred by others of the governing body, without his being a factor in making such preference. Nor does the case involve the question in what sense and to what extent are corporate assets a trust fund in case of the insolvency of the corporation, nor any other of the numerous questions which might arise out of different circumstances in the dealings of corporations. The precise and only question now involved is, may the directors of an insolvent corporation prefer themselves, by devoting its assets to pay debts due them, or debts on which they are bound as indorsers for the corporation? This question has not been before decided in this state, and we have no hesitation to announce that this cannot be lawfully done: To permit it would be to allow those intrusted with the governing power of a corporation to prefer themselves by their own determination and action — a proposition monstrous in the extreme, shocking to the moral sense, and wholly indefensible, as it seems to us. It is a mistake to suppose that in *Sells v. Rosedale Grocery Co.*, 72 Miss., 590, it was held that the directors of an insolvent corporation could lawfully devote the property of such corporation to protect themselves against indorsements they had made. In that case it appears that a majority of the acting body of directors of the insolvent corporation had no interest in the bank which was preferred, and the sole point decided, in that aspect of the case, is that the debtor company was not disabled from preferring another by the fact that one man was president of both, and that there were persons who were stockholders in both — a widely different question from that here involved. Here the preference was resolved on and made by the active and potential participation of the beneficiaries of the assignment. By their own act they appropriated for their own benefit the available assets of the corporation of which they were the governing body.

If it be conceded that a corporation in failing circumstances may do what a natural person may, it would not follow that this preference could be upheld, for it was never heard that a natural person might prefer himself by an assignment, general or special, or otherwise. He may prefer others, but not himself. These directors, by their own will and act, preferred themselves, a thing quite natural, but which the law cannot sanction. By their act they practically dissolved the corporation and put an end to its going, and appropriated its property to themselves, thereby destroying forever all chance of realization by other creditors from the continued operation of the corporation. We deem it unnecessary to cite the numerous cases which have more or less bearing on the question discussed. A large number of them have been collected and referred to in *Commentaries on the Law of Corporations* by Thompson (vol. 5, chap. 146), where

quite a full discussion of the subject may be found, and we content ourselves with this reference.

Decree reversed, demurrer overruled, and cause remanded.

[WHITFIELD, J., delivered an opinion concurring in the result; and also contending that the prior Mississippi decisions, holding that an insolvent corporation can make a preferential assignment, should be overruled.]

CHAPTER XXIII.

CREDITOR'S SUIT TO CORRECT OR RESTRAIN CORPORATE MANAGEMENT. CREDITOR'S SUIT AGAINST DIRECTORS.

POND v. FRAMINGHAM & LOWELL R. CO.

1881. 130 *Mass.* 194.

MORTON, J. This is a bill in equity, the substantial allegations of which are, that the plaintiffs are creditors of the defendant corporation; that the corporation is insolvent; that all its property is mortgaged to trustees for the benefit of one class of creditors; that it owes large amounts to other creditors, one of whom has attached all its property; that it is about to execute a lease to said attaching creditor, for the term of nine hundred and ninety-nine years, at a rental which will not pay the interest upon its indebtedness; and that the execution of said lease would be injurious to the interest of its creditors and stockholders. The prayer is for an injunction to restrain the defendant from further prosecuting its business, and for the appointment of receivers.

There is no statute giving this court equity jurisdiction in such a case as this, and the bill does not state a case within the general equity powers of a court of chancery. As is stated in *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 393, "it is too well settled to admit of question, that a court of chancery has no peculiar jurisdiction over corporations, to restrain them in the exercise of their powers, or control their action, or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief."

The plaintiffs cannot maintain this bill, unless upon the ground that any creditor can maintain a bill in equity against an individual debtor upon like allegations. But there is no allegation of fraud or breach of trust, or any other ground of jurisdiction, which brings the case within the general equity powers of a court of chancery. The bill is an attempt by a creditor to restrain his debtor from making what is alleged to be an improvident contract. The rights of the parties are governed by the rules of the common law. The plaintiffs as creditors might by an attachment have obtained security which would take precedence of the contemplated lease; but if they could not, the court has no power to restrain the debtor from making a disposition of his property which is permitted by the common law, unless fraud or a breach of trust is alleged and shown.

The allegation that the defendant corporation is insolvent does not aid the plaintiffs. In the absence of any statute giving the power, this court has no authority to act as a court of insolvency for the liquidation of the affairs of an insolvent railroad corporation.

Decree dismissing the bill affirmed.

M. Williams & C. A. Williams, for the plaintiffs.

R. Olney, for the defendant.

CLEVELAND CITY FORGE IRON CO. v. TAYLOR BROS. IRON-WORKS CO.

1893. 54 *Federal Reporter*, 85.¹

U. S. Circuit Court, Eastern District of Louisiana.

[The facts sufficiently appear in the opinion, delivered by HON. EDWARD C. BILLINGS, U. S. District Judge, while sitting in the U. S. Circuit Court.]

W. S. Parkerson, Denegre, Bayne & Denegre, for plaintiffs.

Thomas J. Semmes, for defendants.

BILLINGS, District Judge. This cause is submitted on an application for an injunction pendente lite. The defendants are a corporation, limited, organized under the laws of Louisiana, and the stockholders therein. The complainants are plaintiffs in this court, who have commenced suit, two by attachment, and the other by sequestration. The chief object of the injunction sought is to restrain the stockholders from dissolving the corporation. Two points are involved in this application, and must be considered: First, has the corporation been already dissolved? and, second, if not, does the bill make a case for an injunction?

1. As to the claimed dissolution. [The Court *held*, that the corporation had not been legally dissolved.]

2. Does the bill make a case for injunction if the corporation exists? The substance of the bill is that the complainants are creditors with attachment; that the defendants have made an attempt to dissolve the corporation, and, unless prevented by injunction, will dissolve, to the irreparable injury of the complainants. There is no charge of fraud or damage, save by previous gross mismanagement, and what will be accomplished by dissolution. Unless the institution of an attachment suit gives a creditor the right to thus interfere to prevent a dissolution of an indebted corporation, he has none; for the authorities seem to be to the effect that a mere creditor has no right to prevent. The solicitors for the complainant relied upon the case of *Fisk v. Railroad Co.*, 10 Blatchf. 518. A careful study of that case leads me to the conclusion

¹ Only so much of opinion is given as relates to one point. — ED.

that it is distinguishable upon principle from this. There the party obtaining the injunction had already instituted a suit in equity, averring waste of the assets of the corporation, for the purpose of winding up the entire business of the corporation and distributing all its effects. The attempt to dissolve was, therefore, a defiance of the entire purpose of the jurisdiction with which the circuit court was seised. Here there is simply a suit at law with an attachment, the force of which, as carrying any privilege, is dependent upon a judgment. It is a proceeding of individual creditors to secure and collect individual debts. The dissolution would defeat the creditors' object, but is in no sense a defiance of the court's jurisdiction; and, as it seems to me, after thoroughly considering the Case of Fisk, the protection of a previously acquired jurisdiction of a particular subject-matter, viz. the winding up of the affairs of a corporation, and the distribution of its assets from being supplanted, was the ground of the injunction there, which here is wanting. While in each case the object of the suit is defeated, and the dissolution is the medium of ushering in a final administration of the corporation's estate, in the Fisk Case that administration was the sole object of the suit, and was, so to speak, circumvented by the dissolution and consequent administration. The pending suit has a different object, — the collection of a debt, — and is only incidentally interrupted by a suit which, like bankruptcy or insolvency proceedings, absorbs, rather than circumvents, the object of the original suit. The Fisk Case is the only case which has been cited, or which I can find, which seems to sustain the injunction. I think that case inapplicable, and that, upon the doctrines of law, independent of that case, the creditors, who are complainants, upon the ground set forth in the bill, have no more right after an attachment suit has been commenced than they had before to enjoin a dissolution. The attaching creditors, by a dissolution of a defendant corporation, may lose all priority over the other creditors, but their right in equity to enforce their claim to their ratable portion to the corporation's assets by suitable proceedings, which is all that a court of equity can recognize with reference to a dissolution of the defendant corporation, would be left to them. The injunction is therefore refused.

[Extracts from 2 Morawetz on Corporations, 2d ed.]

Ordinarily, creditors of a corporation have no greater rights against their debtor than the creditors of an individual would have. They cannot meddle with the company's management, and can reach the company's property only in pursuance of a judgment or decree by the usual process. s. 860.

Creditors of a corporation are entitled to the usual equitable remedies for the protection of their rights. They are therefore entitled to an injunction to restrain any threatened waste or diversion of the corporate assets which would result in the destruction of their security, *and thereby cause them irreparable loss*. If the managing agents who are in charge of the company's assets are

the persons threatening the wrong, a receiver may be appointed to take the company's property out of their hands. s. 797.

The right of a creditor to prevent waste or diversion of the assets of a corporation, and the right of a shareholder to interfere under similar circumstances, rest upon entirely different grounds. The shareholders of a corporation constitute the corporation itself; they have united under the charter for their mutual benefit, and each shareholder is in equity the owner of a share of the corporate property and rights. Hence, any violation of the charter, or any unauthorized application of the corporate funds, is a violation of the equitable rights of every dissenting shareholder, and presents a ground for equitable interference.

A creditor, however, is not a party to the charter contract, and has no right to complain, though the charter be violated or rescinded. Hence a creditor cannot interfere with the agents of a corporation; and he is not interested in the disposition made of surplus funds of the company, or in the management of its affairs, so long as the company is not insolvent, or in danger of being rendered insolvent by waste of its assets. On the other hand, the unanimous consent of the members of a corporation would not legalize any dealing with the company's assets, in violation of the equitable lien of its creditors.

In considering the right of a creditor of a corporation to restrain a misapplication of the company's assets, it is therefore necessary to bear in mind,

1. A creditor cannot complain of any dealing with the corporate assets unless it be in excess of the wide powers of management retained by the corporation.

2. The ordinary remedy of a creditor is by obtaining judgment and execution against the corporation, and, if necessary, by creditors' bill.

3. A creditor who has not established his claim by a judgment against the company cannot enjoin any dealing with the company's assets, or obtain the appointment of a receiver, unless it be clear, not only that the threatened dealing would impair his equitable rights, but also that he would suffer irreparable injury if left to pursue his ordinary remedy. Interference with the management of a corporation whose business is in operation can be justified only in a strong case. s. 799.

DEADERICK v. BANK.

1897. 100 *Tennessee*, 457.¹

APPEAL from Chancery Court of Davidson County.

The defendant bank, an ordinary banking corporation, organized in 1887, in Nashville, in this State, having become insolvent, suspended business, and made an assignment for the benefit of its creditors, in March, 1893. The complainants, who were among its depositors at the time of the suspension, filed this bill to hold some of its directors liable for their lost deposits. The Chancellor rendered a decree against the directors for \$25,725.34, from which two of them, to wit, Yarbrough and Hill, appealed. Upon hearing the cause, the Court of Chancery Appeals reversed this decree, and discharged the appellants

¹ Statement abridged. Portions of opinion omitted. — Ed.

from all liability. The complainants now assign error on this last decree.

This is a general creditors' bill, brought by complainants after a demand upon, and a refusal of, the assignee to institute suit. In it are many charges of fraud, gross neglect, and wilful mismanagement upon the part of the directors, particularly in permitting and sanctioning certain loans to insolvent parties without proper security, whereby the bank was wrecked, by reason of which, it is alleged, they had "rendered themselves individually liable to complainants," "and such other creditors as saw proper to come in" and avail themselves of these proceedings.

The evidence failed to show that the appellants were guilty of any fraud or wilful mismanagement of the affairs of the bank. There was much evidence that the loans upon which the Chancellor based his decree were imprudent, and were made without that care and prudence which is ordinarily supposed to govern the action of the prudent business man.

Firman Smith and Douglas Wikle, for Deaderick.

Vertrees & Vertrees, Edward H. East, and Geo. T. Hughes, for Bank.

BEARD, J. [After stating the case.] Upon this finding by the Court of Chancery Appeals, it is clear that in so far as complainants rest their right to recover upon the statutory liability of these directors to them, as creditors of this bank, their bill must fail. The statute on this subject is as follows: "If any director or directors of any of the banks of this State shall be guilty of any fraud or wilful mismanagement of the affairs of such bank, by which any loss shall be occasioned to its creditors, such director or directors, upon legal ascertainment of the fact, shall be individually liable for such loss, and all the stockholders assenting thereto shall be liable in like manner." Code (Shannon's), § 3242.

But it is insisted that this statute does not control this case, and that the liability of the defendant directors rests upon a principle independent of it. The position assumed by the complainant is, that the directors of a bank are liable to the corporation for losses resulting to it from their mere negligence in the performance of duties attached to their office; that upon insolvency, the right of action which has thus accrued to the bank passes as an asset to an assignee, under a general assignment for the benefit of its creditors; that if such assignee, on demand, fails or declines to bring suit to enforce this liability, then these creditors may file a bill in equity, for the use of the bank, making proper averments and parties, and recover against the delinquent directors. Is this position sound in reason or upon authority?

It is to be noted that we are not now dealing with a case where the assets of a suspended insolvent corporation have been lost to creditors by the negligence of the parties in control, nor with a case where directors have unlawfully or fraudulently appropriated to their own

use, or otherwise wrongfully diverted, the assets of the bank, but rather with one, where the only ground for recovery is that the defendant directors, in a going corporation, at a time when the record fails to show evidences of insolvency, by their failure to exercise that degree of caution in supervising the business of the bank, that is "ordinarily supposed to govern the action of the prudent business man," have made it possible for a loss to occur to the corporation through the mismanagement of an officer or officers in direct control of its daily transactions.

It is certainly true, as a general proposition, that "the agent's primary duty is to his principal. To him alone does he stand in the relation of privity and confidence. To him alone does he owe the performance of those duties which are implied from that relation, or which he has expressly assumed, and to him alone is the agent responsible for a failure to perform them. It is, therefore, the general rule that no action can be maintained by third persons against the agent to recover damages for any injury which they may have sustained by reason of the nonperformance or neglect of duty which the agent owes to his principal." *Mechem on Agency*, Sec. 539. This rule would certainly obtain if the complainants were creditors of an individual insolvent debtor, and were seeking a recovery against the defendants, as agents of this debtor, for some loss resulting to their principal from their lack of ordinary prudence in the matter of their agency. Such a claim would be repelled promptly, because of the want of the privity relation. Upon what higher or better ground do complainants stand in the present suit?

A corporation "is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true, but in law it is as distinct a being as an individual is, and is entitled to hold property . . . as absolutely as an individual can hold it." *Graham v. Railroad Co.*, 102 U. S. 148; *Deadrick v. Wilson*, 8 Bax. 114; *Parker v. Bethel Hotel Co.*, 12 Pickle, 278. And its directors are agents, in the eye of the law, not of the stockholders, but of this legal entity — the corporation. 3 *Thomp. Corp.*, Sec. 4090. The doctrine that they are trustees has been distinctly repudiated in this State in *Wallace v. Lincoln Bank*, 5 Pickle, 649. In that case this Court said: "Directors are not express trustees; . . . they are mandatories; they are agents; they are trustees in the sense that every agent is a trustee for his principal, and bound to exercise diligence and good faith; they do not hold the legal title, and more often than otherwise are not the officers of the corporation having possession of the corporate property."

That directors are liable in an action at law to their principal, the corporation, for losses resulting to it from their malfeasance, misfeasance, or their failure or neglect to discharge the duties imposed by their office, and in equity, to the stockholders, for these losses, the corporation declining to bring suit, is clear, upon the authorities. Though the corporation is the legal entity, yet the stockholders are

interested in the operations of the corporation while in a state of activity, and, upon its dissolution, in the distribution of its property, after all debts are paid; and so its officers or agents stand in a fiduciary relation to both.

But it is otherwise as to creditors. The directors of a going corporation, whether able to pay its debts or not, owe no allegiance to them. It is true that the creditors may extend credit upon the faith that the company has assets to pay its debts, and that these assets are prudently managed, yet they are strangers to the directors; they maintain no fiduciary relation with them; there is a lack of privity between the two. As was said by the Supreme Court of the United States, in *Briggs v. Spaulding*, 141 U. S. 132, the relation between the creditors and the corporation "is that of contract and not of trust;" but there is nothing, of either contract or trust, in all ordinary cases, to create any relation between the creditor and the directors. A creditor of a going corporation, being thus a mere stranger, we think it clear that he can no more, after the suspension of the corporation by insolvency, either in law or equity, set in motion litigation to hold its directors liable for losses attributable merely to inattention, than could the creditor of any other insolvent debtor maintain a suit against his agent, under similar circumstances.

In such a case as the one we are dealing with, — that is, loss to the corporation resulting from mere negligence on the part of its directors, — a creditor seeking to hold the directors liable for this loss, even in a suit like this, must rest his claim upon some provision of positive law. Mr. Thompson, in the fourth volume, Sec. 4137, of his work on Corporations, says: "We find that it has been held that the fact that directors and officers of a corporation have mismanaged its business does not render them liable to creditors, unless they are made liable by the provisions of the articles of incorporation or by statute." Again, in Sec. 4138, he says: "Neither, in the absence of a special statute, are the directors of a bank liable to a general depositor for mismanaging the affairs of the bank, so that his debt is lost; for, unless they are made liable by statute, the breach of duty of which they have been guilty is to the bank, and not to the customers."

The author here is speaking of mismanagement in the sense of non-feasance as contradistinguished from malfeasance, and, thus restricting it, we think the text announces a sound view of the law. A late case, and one in which this view is enforced with great vigor of reasoning, and after a careful examination and comparison of the authorities, is that of *Landis v. Sea Isle C. H. Co.*, N. J. Eq. (1 Am. & Eng. Corp. Cas. Anno. 208). That was a bill in equity filed by a complainant who was both a stockholder and a creditor of an insolvent corporation, to hold its directors liable for losses sustained by their mismanagement. In the learned opinion of the Vice-Chancellor, the distinction is clearly taken between their liability to complainant in the one character and in the other. To him as a stockholder they

were held to be answerable for losses resulting from their negligence because of the fiduciary relations existing between the two; but to him as a mere creditor, they were held not liable for such negligence, because there was no element of trust in the claim, and no evidence of a diversion by them of corporate funds for corporate purposes.

[Remainder of opinion omitted.]

*Decree of the Court of Chancery Appeals affirmed.*¹

MARSHALL, J., IN KILLEN *v.* BARNES.

1900. 106 *Wisconsin*, 546, pp. 563, 564.

MARSHALL, J. . . . There are numerous cases where the distinction has not been clearly recognized, if at all, between a wrong to a depositor of a bank committed by its officers, for which they are personally liable directly to such depositor on the ground of deceit, and a wrong by such officers to the corporation for which they are liable to such corporation and through it to the creditors. *Delano v. Case*, 121 Ill. 247, is a good specimen of such cases. It would take too much space to review such cases and to try to bring harmony out of the confusion that would be disclosed, though we venture to say that in most instances that proceed on the ground of negligence the purpose will be found to have been to enforce a liability in the right of the corporation. Such is *Hodges v. New England S. Co.*, 1 R. I. 312, often found cited in the books. The confusion on this subject is quite well illustrated by the fact that the *Hodges Case*, a plain action to enforce the right of the corporation because its proper officers failed to do their duty in that regard, is cited in *United Society of Shakers v. Underwood*, 9 Bush, 609, and other authorities upon which the *Delano Case* is grounded, to support the decisions there made that officers of a bank may be held liable directly to depositors for losses of the bank to the damage of depositors, on the ground of negligence and fraud in performance of their duties to the corporation. Other cases to support the direct action of a creditor against an officer for damages to the former, because of the fraud or negligence or other actionable wrong of the latter, are based on statutes, as, for instance, *Stephens v. Overstolz*, 43 Fed. Rep. 465.

The real principle upon which the cases are probably grounded, which hold that the creditors may sue directors to enforce a personal

¹ "There is no relation between the creditors and directors of a corporation of which a court of law can take cognizance, nor have creditors any *legal* claim upon the corporate assets. It is evident, therefore, that a creditor cannot sue the directors at law for damages on account of an unauthorized diversion or waste of the assets by which he has been deprived of his rights. The right of the creditor to have the assets restored, or compensation made for the loss, is a purely equitable claim." 2 Morawetz on Corporations, 2d ed. s. 796. As to suit at law by shareholder against directors, see *Smith v. Hurd*, *ante*, 494. — ED.

right against them, is that they are *quasi* trustees for such creditors under the trust-fund doctrine, so called, which, as will be hereafter shown, has no place in our system. The directors of a corporation are trustees for it and bear no other relation to its creditors than the agent of an individual to his creditors.

CHAPTER XXIV.

RIGHT OF CORPORATE CREDITOR TO COMPEL SHAREHOLDER TO PAY THE FULL PAR VALUE OF HIS STOCK. RIGHTS OF SHAREHOLDERS *INTER SESE* TO COMPEL SUCH PAYMENT.

SAWYER v. HOAG.1873. 17 *Wallace (U. S.)*, 610.¹

APPEAL from the U. S. Circuit Court for the Northern District of Illinois.

Bill in equity by Sawyer against Hoag, assignee of the Lumberman's Insurance Company of Chicago, to enforce an alleged right of set-off. In 1865 the company was incorporated and authorized to begin business on a capital of \$100,000, of which not less than one-tenth should be paid in, the residue to be secured. The directors stated to most of those invited to subscribe that only 15 per cent would be required to be paid down in cash, and that the remaining 85 per cent would be lent back to the subscriber, and a note taken therefor payable in five years, with seven per cent interest, secured by collateral. In 1865 Sawyer, upon the above understanding, subscribed for fifty shares of the par value of \$100 each. He gave his check to the company for \$5000, and his note payable to it in five years for \$4250 (85 per cent of the par value of the stock) with interest; delivered to the company satisfactory collateral security; and received from the company a check for \$4250, by way of, and as for a loan thereof, from the company. He also gave the company authority to sell the securities in case of default in payment of the note or the interest thereon.

Subsequently Sawyer took up the above note, and gave in substitution another note.

The original transaction was treated by the company and by Sawyer as a loan by the company to him, and his stock was treated as fully paid for. At various times after the giving of the note, the company reported to the authorities of the State of Illinois and of other States that its capital stock was fully paid.

¹ Statement abridged. Arguments omitted. — Ed.

In October, 1871, the company was rendered insolvent by the great fire in Chicago.

In January, 1872, Sawyer, having then good reason to believe that the company was insolvent, purchased of one Hayes, for 33 per cent of its par value, a certificate of an adjusted loss for \$5000 against the company.

In June, 1872, a petition in bankruptcy was filed against the company; and, it having been adjudicated a bankrupt, Hoag was appointed its assignee.

Hoag demanded of Sawyer payment of the note for \$4250. Sawyer insisted that, under Section 20 of the Bankrupt Act, he had a right to set off the certificate of adjusted loss for \$5000. Hoag refused to allow the set-off, and was about to sell the collateral securities in accordance with the authority given by Sawyer to the company. Thereupon Sawyer filed the present bill to enforce the set-off; alleging, among other things, that the note given by him to the company was for money lent to him. The assignee, in his answer, denied that the note was for money lent, and averred that it was in fact for a balance due by Sawyer for his stock subscription which had never been paid.

The case was submitted to the court below on an agreed statement of facts. That court decreed against the complainant, Sawyer, who appealed to this court.

D. L. Storey, and *C. Hitchcock*, for appellant.

J. N. Jewett, for appellee.

MILLER, J. The first and most important question to be decided in this case is whether the indebtedness of the appellant to the insurance company is to be treated, for the purposes of this suit, as really based on a loan of money by the company to him, or as representing his unpaid stock subscription.

The charter under which the company was organized authorized it to commence business upon a capital stock of \$100,000, with ten thousand paid in, and the remainder secured by notes with mortgages on real estate or otherwise. The transaction by which the appellant professes to have paid up his stock subscription is, shortly, this: He gave to the company his check for the full amount of his subscription, namely, \$5000. He took the check of the company for \$4250, being the amount of his subscription less the 15 per cent. required of each stockholder to be paid in cash, and he gave his note for the amount of the latter check, with good collateral security for its payment, with interest at 7 per cent. per annum. The appellant and the company, by its officers, agreed to call this latter transaction a loan, and the check of the appellant payment in full of his stock; and on the books of the company, and in all other respects as between themselves, it was treated as payment of the subscription and a loan of money. It is agreed that at this time the current rate of interest in Chicago was greater than 7 per cent., and it is not stated as a fact whether these checks were ever presented and paid at any bank, or that any money

was actually paid or received by either party in the transaction. It must, therefore, be treated as an agreement between the corporation, by its officers, on the one part, and the appellant, as a subscriber to the stock of the company, on the other part, to convert the debt which the latter owed to the company for his stock into a debt for the loan of money, thereby extinguishing the stock debt.

Undoubtedly this transaction, if nothing unfair was intended, was one which the parties could do effectually as far as they alone were concerned. Two private persons could thus change the nature of the indebtedness of one to the other if it was found to be mutually convenient to do so. And in any controversy which might or could grow out of the matter between the insurance company and the appellant we are not prepared to say that the company, as a corporate body, could deny that the stock was paid in full.

And on this consideration one of the main arguments on which the appellant seeks to reverse the decree stands. He assumes that the assignee in bankruptcy is the representative alone of the corporation, and can assert no right which it could not have asserted. The weakness of the argument is in this assumption. The assignee is the representative of the creditors as well as the bankrupt. He is appointed by the creditors. The statute is full of authority to him to sue for and recover property, rights, and credits, where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt himself would be bound. All this, of course, is in the interest of the creditors of the bankrupt.

Had the creditors of this insolvent corporation any right to look into and assail the transaction by which the appellant claims to have paid his stock subscription?

Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen.

The principle is fully asserted in two recent cases in this court, namely, *Burke v. Smith*,¹ and in *New Albany v. Burke*.² Both these cases turned upon the doctrine we have stated, and upon the necessary inference from that doctrine, that the governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration.

In the latter case, a judgment creditor of an insolvent railroad com-

¹ 16 Wallace, 390.

² 11 Id. 96.

pany, having exhausted his remedy at law, sought to enforce this principle by a bill in chancery against the stockholders. The court, by affirming the right of the corporation to deal with the debt due it for stock as with any other debt, would have ended the case without further inquiry. But asserting, on the contrary, to its full extent, that such stock debts were trust funds in their hands for the benefit of the corporate creditors, and must in all cases be dealt with as trust funds are dealt with, it was found necessary to go into an elaborate inquiry to ascertain whether a violation of the trust had been committed. And though the court find that the transaction by which the stockholders had been released was a fair and valid one, as founded on the conditions of the original subscription, the assertion of the general rule on the subject is none the less authoritative and emphatic.¹

In the case before us the assignee of the bankrupt, in the interest of the creditors, has a right to inquire into this conventional payment of his stock by one of the shareholders of the company; and on that inquiry, we are of opinion that, as to these creditors, there was no valid payment of his stock by the appellant. We do not base this upon the ground that no money actually passed between the parties. It would have been just the same if, agreeing beforehand to turn the stock debt into a loan, the appellant had brought the money with him, paid it, taken a receipt for it, and carried it away with him. This would be precisely the equivalent of the exchange of checks between the parties. It is the intent and purpose of the transaction which forbids it to be treated as valid payment. It is the change of the character of the debt from one of a stock subscription unpaid to that of a loan of money. The debt ceases by this operation, if effectual, to be the trust fund to which creditors can look, and becomes ordinary assets, with which the directors may deal as they choose.

And this was precisely what was designed by the parties. It divested the claim against the stockholder of its character of a trust fund, and enabled both him and the directors to deal with it freed from that charge. There are three or four of these cases now before us in which precisely the same thing was done by other insurance companies organized in Chicago, and we have no doubt it was done by this company in regard to all their stockholders.

It was, therefore, a regular system of operations to the injury of the creditor, beneficial alone to the stockholder and the corporation.

We do not believe we characterize it too strongly when we say that it was a fraud upon the public who were expected to deal with them.

The result of it was that the capital stock of the company was neither paid up in actual money, nor did it exist in the form of deferred instalments properly secured.

It is said by the appellant's counsel that conceding this, it is still a

¹ See also *Curran v. State of Arkansas*, 15 Howard, 304; *Wood v. Dummer*, 3 Mason, 305; *Slee v. Bloom*, 19 Johnson, 456, and numerous other cases cited by the counsel for the appellees.

debt due by him to the corporation at the time that he became the owner of the debt due by the corporation to Hayes, and, therefore, the proper subject of set-off under the twentieth section of the Bankrupt Act. That section is as follows: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition."

This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it.

The debts must be mutual; must be in the same right.

The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim.

It is unnecessary to go into the inquiry whether this claim was acquired before the commission of an act of bankruptcy by the company, or the effect of the bankruptcy proceeding. The result would be the same if the corporation was in the process of liquidation in the hands of a trustee or under other legal proceedings. It would still remain true that the unpaid stock was a trust fund for all the creditors, which could not be applied exclusively to the payment of one claim, though held by the stockholder who owed that amount on his subscription.

Nor do we think the relation of the appellant in this case to the corporation is without weight in the solution of the question before us. It is very true, that by the power of the legislature there is created in all acts of incorporation a legal entity which can contract with its shareholders in the ordinary transactions of business as with other persons. It can buy of them, sell to them, make loans to them, and in insurance companies, make contracts of insurance with them, in all of which both parties are bound by the ordinary laws of contract. The stockholder is also relieved from personal liability for the debts of the company. But after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just that when the interest of the public, or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be

subject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him.¹

These principles require the affirmation of the decree in the present case, and it is accordingly *Affirmed.*

Mr. Justice HUNT dissented, holding that the transaction was a loan by the company to the appellant.²

IN RE GREAT NORTHERN AND MIDLAND COAL CO. CURRIE'S CASE.

1862. 3 *De Gex, Jones, & Smith*, 367.³

APPEAL by Currie and four other persons from an order in the winding-up of the company, placing them on the list of contributories, and making a call upon them in respect of certain classes of shares held by them.

The appellants held 100 shares transferred to them by one Butcher, which were originally allotted to him as paid-up shares in part of the consideration of property purchased by the directors from him. The appellants were also holders of other paid-up shares taken by them for attendance fees as directors. The validity of the purchase by the company from Butcher was in dispute; as was also the legality of the payment of attendance fees without the sanction of a general meeting.

Daniel and Hardy, for appellants.

Bacon and Roxburgh, for the official liquidator.

THE LORD JUSTICE TURNER.

¹ *Lawrence v. Nelson*, 21 New York, 158.

² "Suppose every stockholder of an insolvent corporation had a claim against it equal to the amount of his unpaid subscription, and that there were other creditors holding claims to a much larger amount than those held by all the stockholders. If the stockholders could set off their claims against the amounts due by them upon their unpaid subscriptions, no other creditor would get a cent upon his claim. This would give a preference to those whose acts caused the insolvency of the corporation, over those who had no control in its management, and were in no respect chargeable with its failure." GARY, J., in *Efrd v. Piedmont, &c., Co.*, A. D. 1899, 55 South Carolina, 78, p. 87. See also *Richardson v. Merritt*, A. D. 1899, 74 Minnesota, 354, p. 362, and *First Nat. Bank v. Riggins*, A. D. 1899, 124 North Carolina, 534.

But see the reasoning of Prof. Pepper, to show "that a right to set-off would exist in favor of a stockholder-creditor, even upon the trust theory." 34 Am. Law Register, N. S., p. 454. — ED.

³ Statement abridged. Arguments omitted. Only so much of the opinion is given as relates to a single point. — ED.

These shares were allotted to *Butcher* under the authority given by the articles as paid-up shares in part of the consideration of the purchase made by the directors from him. That purchase was either valid or invalid. If valid it is clear that neither he nor his alienees can be called upon to contribute in respect of these shares. If invalid, I cannot see my way to hold that either a Court of law or a Court of equity could do more than treat the purchase as void, and undo the transaction altogether. It could not, as I apprehend, be competent either to a Court of law or to a Court of equity to alter the terms of the purchase, and treat as shares not paid-up shares which were given as paid-up shares in part consideration of the purchase. Fraud, assuming there was fraud, would of course warrant the Court in treating the purchase as void, or in undoing it; but it could not, as I conceive, authorize any Court to substitute other terms.

As to the shares taken for attendance fees, I am also of opinion that the Appellants are not liable to contribute in respect of those shares. They were taken, and, as it seems to me, improperly taken, as paid-up shares, but the same principles which apply to the 100 shares apply, as I think, to these shares also. The transaction might be undone but could not be modelled.

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SCOVILL v. THAYER.

1881. 105 U. S. 143.¹

ERROR to U. S. Circuit Court for the District of Massachusetts.

The defendant was the holder of 285 shares of the first two issues of stock of the Fort Scott Coal and Mining Company, a corporation organized under the General Laws of Kansas. The par value was \$100 per share. On 200 of defendant's shares he paid only \$20 per share; and on the remaining 85 shares he paid only \$40 per share. By agreement made at the date of the several issues of stock, the amounts paid thereon were credited to the subscribers, and the balance unpaid credited by "discount," and certificates as for full-paid shares were delivered to the subscribers, and the stock account between the company and them balanced by such "discount." In April, 1874, the company was adjudicated a bankrupt in the U. S. District Court for Kansas; and plaintiffs were appointed assignees. In 1876, in accordance with an order of the U. S. District Court, the assignees made an assessment upon the stock of the company of 76 per cent, upon which should be credited to each stockholder any sums paid by him on his shares.

¹ Statement abridged. Portions of opinion omitted. — **ED.**

The defendant having failed to pay within the time limited by the order, the assignees sued him in the present action at law to recover the amount of the assessment.

The defendant pleaded: 1st, a general denial; 2d, the limitation of two years prescribed by the Act of March 2, 1867, Ch. 176, Sect. 2 (now embodied in Revised Statutes as Section 5057). This statute provides, in substance, that no suit at law or in equity shall be maintainable between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee.

The case was submitted to the Circuit Court upon an agreed statement of facts. The Court rendered judgment for defendant, holding that the cause of action was barred by the limitation of two years.

J. E. McKeighan, and *A. A. Ranney*, for plaintiffs in error.

Sidney Bartlett, *William G. Russell*, and *George Putnam*, for defendant in error.

WOODS, J.

We are next to consider whether, upon the facts as disclosed by the record, the defence of the Statute of Limitations should have been sustained. The precise question with which we have to deal is, When would this action at law, brought by the assignees of the bankrupt company against a stockholder, to recover a part of the balance due on his stock, be barred by the statute?

This will depend on the answer to the question, When did the cause of action accrue to the assignees? In other words, When could they have commenced this action against this defendant to recover the amount due on his stock? *Wilcox v. Plummer's Ex'rs*, 4 Pet. 172; *Amy v. Dubuque*, 98 U. S. 470.

The stock held by the defendant was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the stockholders was just as binding as if it had been expressly authorized by the charter.

If the company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock, which had been satisfied "by discount" according to their contract, they could have successfully resisted such a demand. No suit could have been maintained by the company to collect the unpaid stock for such a purpose. The shares were issued as full paid, on a fair understanding, and that bound the company.

In fact, it has been held in recent English cases that not only is the

company but its creditors also are bound by such a contract. *Waterhouse v. Jamieson*, Law Rep. 2 H. L. (Sc.) 29; *Currie's Case*, 3 De G., J. & S. 367; *Carling, Hespeler, and Walsh's Cases*, 1 Ch. D. 115.

But the doctrine of this court is, that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside; that when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full. *Sawyer v. Hoag, Assignee*, 17 Wall. 610; *New Albany v. Burke*, 11 id. 96; *Burke v. Smith*, 16 id. 390.

The reason is, that the stock subscribed is considered in equity as a trust fund for the payment of creditors. *Wood v. Dummer*, 3 Mas. 308; *Mumma v. Potomac Co.*, 8 Pet. 281; *Ogilvie v. Knox Insurance Co.*, 22 How. 387; *Sawyer v. Hoag, supra*. It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up, and if it is not, a court of equity will at his instance require it to be paid.

In this case the managers and agents of the bankrupt company had in effect represented to the public that all its capital stock had been subscribed for, and had been or would be paid in full. Considered, therefore, in the view of a court of equity, the contract between the company and its stockholders was this, namely, that the stockholders should pay, say, for example, twenty dollars per share on their stock and no more, unless it became necessary to pay more to satisfy the creditors of the company, and when the necessity arose and the amount required was ascertained, then to make such additional payment on the stock as the satisfaction of the claims of creditors required.

When the company was adjudicated a bankrupt, the assignees were bound by this contract, thus equitably construed. Their duty was to collect a sufficient sum upon the unpaid stock, which, with the other assets of the company, would be sufficient to satisfy the company's creditors. They were authorized to collect no more. If it should turn out that the other assets were sufficient, no action would lie against the stockholder for the balance due on his stock. For if in a bankruptcy proceeding any surplus remained after payment of debts, it would go to the company and not to the stockholders. And we have seen that the company in this case would have no right to any surplus.

The question for solution is, therefore, When, under the facts of this case, did the cause of action accrue against the defendant in error? Certainly not until it became his duty to pay according to the terms of his contract or according to law.

It is well settled that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. *Curry v. Woodward*, 53 Ala. 371; *Robinson v. Bank of Da-*

men, &c., 18 Ga. 65; *Ward v. Griswoldville Manufacturing Co.*, 16 Conn. 593. But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment. And it is clear the Statute of Limitations does not begin to run in his favor until such order or demand. *Van Hook v. Whitlock*, 3 Paige (N. Y.), 409; *Salisbury v. Black's Adm'r*, 6 Har. & J. (Md.) 293; *Sinkler v. The Turnpike Company*, 3 Pa. 149; *Walter v. Walter*, 1 Whart. (Pa.) 292; *Quigg v. Kittredge*, 18 N. H. 137; *Nimmo v. Walker*, 14 La. Ann. 581.

In this case there was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete.

But not only was it necessary that the amount required to satisfy creditors should be ascertained, but that the agreement between the company and the stockholder to the effect that the latter should not be required to make any further payments on his stock should be set aside as in fraud of creditors. No action at law would lie to recover the unpaid balance due on the stock until this was done. The proceeding for an assessment in the bankruptcy court was in effect a proceeding to accomplish two purposes: first, to set aside the contract between the company and the stockholder; and, second, to fix the amount which he should be required to pay. Until these things were done the cause of action against the stockholder did not accrue, although his primary obligation was assumed at the time when he subscribed the stock.

It appears from the petition of the assignees for an assessment upon the stock of the bankrupt company, that they had used due diligence to ascertain what additional payments on the stock would be required to pay off the claims of creditors; that at as early a time as possible they applied to the court for an order directing that the stockholders should pay a part of the amount due on their shares of stock, and assessing the stock therefor; that the order was made accordingly, and within five months thereafter this action at law was begun to enforce its payment.

If, therefore, the right to bring this suit did not accrue to the assignees until the assessment was made upon the stock by the court, and the stockholders were required to pay it, the action was brought long before the limitation of the statute could bar it.

The case of *Terry v. Anderson* (95 U. S. 628), also relied on by the defendant, was a suit in equity to enforce the individual liability of the stockholders of a bank, and to collect unpaid subscriptions to its capital stock. There was no agreement on the part of the bank not to collect the balance due on the stock. The bank itself could have enforced payment, without regard to the necessity for its collection, to satisfy the debts of the bank. And so the court held that the Statute of Limitations began to run against the bank and its creditors, in favor of the stockholder, when the bank stopped payment.

But in the present case, as we have seen, there was, as between the company and its stockholders, no obligation on the part of the latter to pay the residue of their stock, unless it became necessary to satisfy creditors. We think, therefore, we are safe in saying that the statute did not begin to run in favor of the stockholders until at the very least the necessity for the payment had been ascertained, and an authorized demand of payment made.

For the error in holding that the action was barred, the judgment of the Circuit Court must be reversed, and the cause remanded with directions to award a

New trial.

FIELD, J., and GRAY, J., dissented.

HOSPES v. NORTHWESTERN MFG. & CAR CO.

1892. 48 *Minnesota*, 174.¹

MITCHELL, J. This appeal is from an order overruling a demurrer to the so-called "supplemental complaint" of the Minnesota Thresher Manufacturing Company. The Northwestern Manufacturing & Car Company was a manufacturing corporation organized in May, 1882. Upon the complaint of a judgment creditor (Hospes & Co.), after return of execution unsatisfied, judgment was rendered in May, 1884, sequestrating all its property, things in action, and effects, and appointing a receiver of the same. This receivership still continues, the affairs of the corporation being not yet fully administered; but it appears that it is hopelessly insolvent, and that all the assets that have come into the hands of the receiver will not be sufficient to pay any considerable part of the debts. The Minnesota Thresher Manufacturing Company, a corporation organized in November, 1884, as creditor, became a party to the sequestration proceeding, and proved

¹ Statement and arguments omitted. — ED.

its claims against the insolvent corporation. In October, 1889, in behalf of itself and all other creditors who have exhibited their claims, it filed this complaint against certain stockholders (these appellants) of the car company, in pursuance of an order of court allowing it to do so, and requiring those thus impleaded to appear and answer the complaint. The object is to recover from these stockholders the amount of certain stock held by them, but alleged never to have been paid for. What was said in *Meagher's Case*, ante, p. 158, 50 N. W. Rep. 1114 (just decided), is equally applicable here as to the right to enforce such a liability in the sequestration proceeding upon the petition or complaint of creditors who have become parties to it. There is nothing in this practice inconsistent with what was decided in *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37 (46 N. W. Rep. 310). The complaint is not the commencement of an independent action by creditors in their own behalf, antagonistic to the rights of the receiver, but is filed in the sequestration proceeding itself, and in aid of it.

The principal question in the case is whether the complaint states facts showing that the thresher company, as creditor, is entitled to the relief prayed for; or, in other words, states a cause of action. Briefly stated, the allegations of the complaint are that on May 10, 1882, Seymour, Sabin & Co. owned property of the value of several million dollars, and a business then supposed to be profitable. That, in order to continue and enlarge this business, the parties interested in Seymour, Sabin & Co., with other, organized the car company, to which was sold the greater part of the assets of Seymour, Sabin & Co. at a valuation of \$2,267,000, in payment of which there were issued to Seymour, Sabin & Co. shares of the preferred stock of the car company of the par value of \$2,267,000, it being then and there agreed by both parties that this stock was in full payment of the property thus purchased. It is further alleged that the stockholders of Seymour, Sabin & Co., and the other persons who had agreed to become stockholders in the car company, were then desirous of issuing to themselves, and obtaining for their own benefit, a large amount of common stock of the car company, "without paying therefor, and without incurring any liability thereon or to pay therefor;" and for that purpose, and "in order to evade and set at naught the laws of this state," they caused Seymour, Sabin & Co. to subscribe for and agree to take common stock of the car company of the par value of \$1,500,000. That Seymour, Sabin & Co. thereupon subscribed for that amount of the common stock, but never paid therefor any consideration whatever, either in money or property. That thereafter these persons caused this stock to be issued to D. M. Sabin as trustee, to be by him distributed among them. That it was so distributed without receipt by him or the car company, from any one, of any consideration whatever, but was given by the car company and received by these parties entirely "gratuitously." The car com-

pany was at this time free from debt, but afterwards became indebted to various persons for about \$3,000,000. The thrasher company, incorporated after the insolvency and receivership of the car company, for the purpose of securing possession of its assets, property, and business, and therewith engaging in and continuing the same kind of manufacturing, prior to October 27, 1887, purchased and became the owner of unsecured claims against the car company, "*bona fide*, and for a valuable consideration," to the aggregate amount of \$1,703,000. As creditor, standing on the purchase of these debts, which were contracted after the issue of this "bonus" stock, the thrasher company files this complaint to recover the par value of the stock as never having been paid for. The complaint does not allege what the consideration of these debts was, nor to whom originally owing, nor what the intervener paid for them, nor whether any of the original creditors trusted the car company on the faith of the bonus stock having been paid for. Neither does it allege that either the thrasher company or its assignors were ignorant of the bonus issue of stock, nor that they or any of them were deceived or damaged in fact by such issue, nor that the bonus stock was of any value. Neither is there any traversable allegation of any actual fraud or intent to deceive or injure creditors. A desire to get something without paying for it, and actually getting it, is not fraudulent or unlawful if the donor consents, and no one else is injured by it; and the general allegation that it was done "in order to evade and set at naught the laws of the state" of itself amounts to nothing but a mere conclusion of law. As a creditor's bill, in the ordinary sense, the complaint is manifestly insufficient. The thrasher company, however, plants itself upon the so-called "trust-fund" doctrine, that the capital stock of a corporation is a trust fund for the payment of its debts; its contention being that such a "bonus" issue of stock creates, in case of the subsequent insolvency of the corporation, a liability on part of the stockholder in favor of creditors to pay for it, notwithstanding his contract with the corporation to the contrary.

This "trust-fund" doctrine, commonly called the "American doctrine," has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its application. To such an extent has this been the case that many have questioned the accuracy of the phrase, as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe foundation upon which to build a system of legal rules. The doctrine was invented by Justice Story in *Wood v. Dummer*, 3 Mason, 308, which called for no such invention, the fact in that case being that a bank divided up two thirds of its capital among its stockholders without providing funds sufficient to pay its outstanding billholders. Upon old and familiar principles this was a fraud on creditors. Evidently all that the eminent jurist meant by the doctrine

was that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution of it among stockholders, — a proposition that is sound upon the plainest principles of common honesty. In *Fog v. Blair*, 133 U. S. 534, 541 (10 Sup. Ct. Rep. 338), it is said that this is all the doctrine means. The expression used in *Wood v. Dummer* has, however, been taken up as a new discovery, which furnished a solution of every question on the subject. The phrase that "the capital of a corporation constitutes a trust fund for the benefit of creditors" is misleading. Corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests,—one equitable and one legal; one person, as trustee, holding the legal title, while another, as the *cestui que trust*, has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further. This is well illustrated and clearly announced in the case of *Graham v. La Crosse & M. R. Co.*, 102 U. S. 148. That was a creditors' suit to reach a piece of real estate on the ground that it had been conveyed by the corporation fraudulently for a wholly inadequate consideration. The trust-fund doctrine was invoked by a subsequent creditor, and it was claimed that, as the trust had been violated, the deed should be set aside. If the premise was correct that the corporation held it in trust for creditors, the conclusion was inevitable; but the court denied the premise, saying that a corporation is in law as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same; and that there is no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors any more than a like disposal by an individual; that the same principles of law apply to each. That the phrase that "the capital of a corporation is a trust fund for the payment of its creditors" is misleading, if not inaccurate, is illustrated by the character of the actions that are frequently mistakenly instituted on the strength of it. For example, in the case of *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587 (5 Sup. Ct. Rep. 1081), two roads had been consolidated, the new company acquiring the property of the old ones. A creditor of one of the old companies, on the strength of the "trust-fund" doctrine, claimed a lien on its property in the hands of the new corporation. If this property was impressed with a trust in favor of creditors in the hands of the old company, it would logically follow that it would continue so in the hands of the new one. But the court denied the relief, and, in giving its construction of the "trust-fund"

doctrine, said: "The property of a corporation is doubtless a trust fund for the payment of its debts in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of the property of the debtor without authority of law and in fraud of existing creditors is void." This is probably what is meant when it is said in some cases, as in *Clark v. Bever*, 139 U. S. 96, 110 (11 Sup. Ct. Rep. 468), that the capital of a corporation is a trust fund *sub modo*. If so, no one will dispute it. But it means very little, for the same thing could be truthfully said of the property of an individual or a partnership. And obviously it would make no difference whether the disposition of the corporate property is to a stranger or to a stockholder, except that, of course, the latter could not be an innocent purchaser.

There is also much confusion in regard to what the "trust-fund" doctrine applies. Some cases seem to hold that unpaid subscribed capital is a trust fund, while other assets are not,—that is, so long as the subscription is unpaid, it is held in trust by the corporation, but, when once paid in, it ceases to be a trust fund; while other cases hold that, paid or unpaid, it is all a trust fund. The first seems to be the rule laid down in *Sawyer v. Hoag*, 17 Wall. 610, in which the "trust-fund" doctrine was first squarely announced by that court with all the vigor and force characteristic of the great jurist who wrote the opinion. In that case a stockholder in an insurance company had given his note, as the court found the fact to be, for 85 per cent. of his subscription to the stock of the company. After the company had become bankrupt, and the stockholder knew the fact, he bought up a claim against the company for one third its face, and in a suit by the assignee in bankruptcy on his note set up this claim as an offset. That this would have been a fraud on the bankrupt act, and at least a moral fraud on policy holders, is quite apparent without invoking the "trust-fund" doctrine; and, if the note for unpaid stock was a trust fund, there could have been no offset, whether the company was solvent or insolvent. In the opinion it is said that, if the subscription had been paid by the note or otherwise, the note ceased thereby to be a trust fund to which creditors can look, and becomes ordinary assets, with which directors may deal as they choose. But in *Upton v. Tribilcock*, 91 U. S. 45, it is stated: "The capital paid in and promised to be paid in is a fund which the trustees cannot squander or give away." While in *Sanger v. Upton*, Id. 56, it is said: "When debts are incurred a contract arises with the creditors that it [the capital] shall not be withdrawn or applied otherwise than upon their demands until such demands are satisfied." And in the same connection it is distinctly stated that there is no difference between assets paid in and subscriptions; that "unpaid stock is as much a

part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. *As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation.*" This language is quoted and approved in *County of Morgan v. Allen*, 103 U. S. 498, 508. It would seem clear that this is the correct statement of the law. The capital (not the mere share certificates) means all the assets, however invested. If a subscriber gives his note for his stock, that note is no more and no less a trust fund than the money would have been if he had paid cash down. Capital cannot change from a trust to not a trust by a mere change of form. It is either all a trust or all not a trust, and the "trust-fund" rule, whatever that be, must apply to all alike, and in the same way. If the assets of a corporation are given back to stockholders, the result is the same as if the shares had been issued wholly or partly as a bonus. The latter is merely a short cut to the same result. So with dividends paid out of the capital, voluntary conveyances, stock paid in overvalued property; all are forms of one and the same thing, all reaching the same result (a disposition of corporate assets), which may or may not be a fraud on creditors, depending on circumstances. This much being once settled, the solution of the question when a subsequent creditor can insist on payment of stock issued as paid up, but not in fact paid for, or not paid for at par, becomes, as we shall presently see, comparatively simple.

Another proposition which we think must be sound is that creditors cannot recover on the ground of contract when the corporation could not. Their right to recover in such cases must rest on the ground that the acts of the stockholders with reference to the corporate capital constitutes a fraud on their rights. We have here a case where the contract between the corporation and the takers of the shares was specific that the shares should not be paid for. Therefore, unlike many of the cases cited, there is no ground for implying a promise to pay for them. The parties have explicitly agreed that there shall be no such implication, by agreeing that the stock shall not be paid for. In such a case the creditors undoubtedly may have rights superior to the corporation, but these rights cannot rest on the implication that the shareholder agreed to do something directly contrary to his real agreement, but must be based on tort or fraud, actual or presumed. In England, since the act of 1867, there is an implied contract created by statute that "every share in any company shall be deemed and be taken to have been issued and to be held subject to the payment of the whole amount thereof in cash." This statutory contract makes every contrary contract void. Such a statute would be entirely just to all, for every one would be advised of its provisions, and could conduct himself accordingly. And in view of the fact that "watered"

and "bonus" stock is one of the greatest abuses connected with the management of modern corporations, such a law might, on grounds of public policy, be very desirable. But this is a matter for the legislature, and not for the courts. We have no such statute; and, even if the law of 1873, under which the car company was organized, impliedly forbids the issue of stock not paid for, the result might be that such issue would be void as *ultra vires*, and might be cancelled, but such a prohibition would not of itself be sufficient to create an implied contract, contrary to the actual one, that the holder should pay for his stock.

It is well settled that an equity in favor of a creditor does not arise absolutely and in every case to have the holder of "bonus" stock pay for it contrary to his actual contract with the corporation. Thus no such equity exists in favor of one whose debt was contracted prior to the issue, since he could not have trusted the company upon the faith of such stock. *First Nat. Bank v. Gustin, etc., Mining Co.*, 42 Minn. 327 (44 N. W. Rep. 198); *Coit v. Gold Amalgamating Co.*, 119 U. S. 343 (7 Sup. Ct. Rep. 231); *Handley v. Stutz*, 139 U. S. 417, 435 (11 Sup. Ct. Rep. 530). It does not exist in favor of a subsequent creditor who has dealt with the corporation with full knowledge of the arrangement by which the "bonus" stock was issued, for a man cannot be defrauded by that which he knows when he acts. *First Nat. Bank v. Gustin, etc., Mining Co., supra*. It has also been held not to exist where the stock has been issued and turned out at its full market value to pay corporate debts. *Clark v. Bever, supra*. The same has been held to be the case where an active corporation, whose original capital has been impaired, for the purpose of recuperating itself issues new stock, and sells it on the market for the best price obtainable, but for less than par (*Handley v. Stutz, supra*); although it is difficult to perceive, in the absence of a statute authorizing such a thing (of which every one dealing with corporations is bound to take notice), any difference between the original stock of a new corporation and additional stock issued by a "going concern." It is difficult, if not impossible, to explain or reconcile these cases upon the "trust-fund" doctrine, or, in the light of them, to predicate the liability of the stockholder upon that doctrine. But by putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and in case the corporation becomes insolvent, the law, upon the plainest princi

ples of common justice, says to the delinquent stockholder, "Make that representation good by paying for your stock." It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of "bonus" stock. This furnishes a rational and uniform rule, to which familiar principles are easily applied, and which frees the subject from many of the difficulties and apparent inconsistencies into which the "trust-fund" doctrine has involved it; and we think that, even when the trust-fund doctrine has been invoked, the decision in almost every well-considered case is readily referable to such a rule.

It is urged, however, that, if fraud be the basis of the stockholders' liability in such cases, the creditor should affirmatively allege that he believed that the bonus stock had been paid for, and represented so much actual capital, and that he gave credit to the corporation on the faith of it; and it is also argued that, while there may be a presumption to that effect in the case of a subsequent creditor, this is a mere presumption of fact, and that in pleadings no presumptions of fact are indulged in. This position is very plausible, and at first sight would seem to have much force; but we think it is unsound. Certainly any such rule of pleading or proof would work very inequitably in practice. Inasmuch as the capital of a corporation is the basis of its credit, its financial standing and reputation in the community has its source in, and is founded upon, the amount of its professed and supposed capital, and every one who deals with it does so upon the faith of that standing and reputation, although, as a matter of fact, he may have no personal knowledge of the amount of its professed capital; and in a majority of cases knows nothing about the shares of stock held by any particular stockholder, or, if so, what was paid for them. Hence, in a suit by such creditor against the holders of "bonus" stock, he could not truthfully allege, and could not affirmatively prove, that he believed that the defendants' stock had been paid for, and that he gave the corporation credit on the faith of it, although, as a matter of fact, he actually gave the credit on the faith of the financial standing of the corporation, which was based upon its apparent and professed amount of capital. The misrepresentation as to the amount of capital would operate as a fraud on such a creditor as fully and effectually as if he had personal knowledge of the existence of the defendants' stock, and believed it to have been paid for when he gave the credit. For this reason, among others, we think that all that it is necessary to allege or prove in that regard is that the plaintiff is a subsequent creditor; and that, if the fact was that he dealt

with the corporation with knowledge of the arrangement by which the "bonus" stock was issued, this is a matter of defence. *Gogebio Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427 (47 N. W. Rep. 726). Counsel cites *Fogg v. Blair*, *supra*, to the proposition that the complaint should have stated that this stock had some value; but that case is not in point, for the plaintiff there was a prior creditor; and, as his debt could not have been contracted on the faith of stock not then issued, he could only maintain his action, if at all, by alleging that the corporation parted with something of value.

In one respect, however, we think the complaint is clearly insufficient. The thrasher company is here asking the interposition of the court to aid in enforcing an equity in favor of creditors against the stockholders by declaring them liable to pay for this stock contrary to their actual contract with the corporation. While the proceeding is not, strictly speaking, an equitable action, yet the relief asked is equitable in its nature. Under such circumstances, it was incumbent upon the thrasher company to show its own equities, and that it was in a position to demand such relief. It was not the original creditor of the car company, but the assignee of the original creditors. By that purchase it, of course, succeeded to whatever strictly legal rights its assignors had; but it is not rights of that kind which it is here seeking to enforce. Under such circumstances, we think it was incumbent upon it to state what it paid for the claims, or at least to show that it paid a substantial, and not a mere nominal, consideration. The only allegation is that it paid "a valuable consideration." This might have been only one dollar. It appears that it bought the claims after the car company had become insolvent, and its affairs were in the hands of a receiver; also that the indebtedness of that company amounted to about \$3,000,000, and that there were not corporate assets enough to pay any considerable part of it. The mere chance of collecting something out of the stockholders does not ordinarily much enhance the selling price of claims against an insolvent corporation. If any person or company had gone to work and bought up for a mere song this large indebtedness of the car company for the purpose of speculating on the liability of the stockholders, no court would grant them the relief here prayed for. It would say to them: "We will not create and enforce an equity for the benefit of any such speculation." Counsel for respondent suggest that the thrasher company is but an organization of the original creditors, who formed it, and pooled their claims, so as to save something out of the wreck of the car company; but nothing of the kind is alleged. On this ground the demurrer should have been sustained.

In view of further proceedings it may be proper to say that in our opinion there is nothing in the position that the right of recovery against the stockholders was barred by the statute of limitation. The argument in support of the proposition all rests upon the false premise that the cause of action accrued in May, 1882, when the bonus

stock was issued. The corporation never had any cause of action against these defendants. As between them and the company, the agreement for the issue of the stock was valid. The creditors are not here seeking to enforce a right of action acquired through or from the corporation, but one that accrued directly to themselves, or for their benefit, and that did not accrue at least until the corporation became insolvent, in May, 1884.

Order reversed.

FIRST NATIONAL BANK OF DEADWOOD *v.* GUSTIN, &c.
MINING CO. ET ALS.

1890. 42 *Minnesota*, 327.¹

ACTION upon a debt of defendant corporation, and against the other defendants as stockholders, to obtain judgment against the corporation for the amount of the debt, and against the other defendants for the respective amounts alleged to be due and unpaid on the stock held by them, so far as necessary to satisfy the judgment against the corporation.

The defendant corporation was organized November 13, 1886, for the purpose of consolidating two other companies, acquiring their property, and with the property so acquired carrying on a general mining business. The nominal capital was 250,000 shares of \$10 each. 100,000 shares were issued to the stockholders of the two old companies as paid up stock, but it was not paid for except by conveying the property of the old companies, which every one understood to be worth very much less than the par value of this amount of stock. The stock so issued was called "Old Company Stock."

It was never expected or intended by the corporation, or by those to whom the stock was issued, that any capital stock should ever be taken, or any capital paid in, except by conveyance to the corporation of the mining properties aforesaid, and by the sale of the remaining stock in open market for such sum as could be obtained therefor.

The plaintiff bank was a creditor of one of the old companies, and accepted the notes of the defendant company in place of those of the old company. The managing officer of the bank who accepted these notes then knew all the above facts relative to the organization and plan of the defendant corporation.

Subsequently the remaining stock was offered for sale in open market by the corporation, and part was purchased by some of the defendants,

¹ Statement abridged. Part of opinion omitted. — Ed.

at a price exceeding its fair market value, but very much less than its par value. The stock so sold was called "Treasury Stock." In March, 1887, the directors distributed *pro rata* among the individual shareholders all the stock remaining unsold in the treasury. This was called "Pro Rate Stock."

The District Court ordered judgment against the corporation for the amount of plaintiff's claim, but in favor of the other defendants. Plaintiff appealed.

John B. & W. H. Sanborn, and *G. E. Moody*, for appellant.

Warner & Lawrence, for respondents.

MITCHELL, J.

The contention of the plaintiff is that the defendant shareholders are individually liable, as for unpaid stock subscriptions, for amounts equal to the amount of their stock, less the value of what they have actually paid therefor, viz., nine dollars per share on the old company and treasury stock, for which they paid in value only one dollar per share, and ten dollars per share on the pro rate stock, for which they paid nothing. If these stockholders were indebted to the corporation for unpaid instalments on stock, this debt would be an asset of the corporation which, in case it became insolvent, any creditor might always enforce for the purpose of satisfying his claim. But it is very clear from the facts that the defendant company has no claim against the defendant stockholders. They owe it nothing. As between them and it, the arrangement by which this stock was issued and sold, or given away, as fully paid stock, is entirely valid. But the plaintiff bases its claim upon the familiar doctrine that the capital stock of a corporation is a trust fund for the benefit of its creditors, and that, if shares are not in fact paid up, an arrangement between the corporation and the shareholders that they shall be deemed paid up, although valid between the company and the stockholder, will be ineffectual as to creditors, and that equity will hold the shareholder liable for the amount not in fact paid on his stock, to the extent necessary to satisfy the demands of creditors. We waive consideration of the question (which may, at least, admit of doubt) whether plaintiff's complaint is sufficient to entitle it to such relief. See *Phelan v. Hazard*, 5 Dill. 45; *Cook, Stocks*, § 47; *Scovill v. Thayer*, 105 U. S. 143.

The general proposition advanced by plaintiff cannot be controverted, but the principle upon which this trust in favor of creditors rests and is administered must not be overlooked. The whole doctrine that the capital stock of corporations is a trust fund for the payment of creditors rests upon the equitable consideration that the distribution of the capital among stockholders without making adequate provision for the payment of debts, or the issue of fictitiously paid-up stock, is a fraud upon creditors who contract with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been in fact paid up in full. But when the rea-

son for the rule does not exist the rule itself ceases to apply. This trust does not arise absolutely in every case, in favor of every and any creditor. It is not true, and no case can be found which holds, that it is in the power of a creditor in every and all cases, as a matter of right, to institute an inquiry as to the value or amount of the consideration given for stock issued as fully paid up, any more than that it would be his right, in any and every case, to inquire into the distribution of the capital among the shareholders. It is only those creditors who can fairly allege that they have relied, or whom the law presumes to have relied, upon the amount of capital stock of the company, who have a right to make such inquiry, or in whose favor equity will impress a trust upon the subscription to the stock, and set aside a fictitious arrangement for its payment. For example, to distribute the capital among the shareholders without provision for paying corporate debts would be a fraud on existing creditors, as well as on such subsequent creditors as deal with the corporation in reliance upon the assumption that its professed capital remains intact. An illustration of this kind is to be found in the very first case in which what is now called the "American doctrine" was announced by Justice Story. We refer to the case of *Wood v. Dummer*, 3 Mason, 308, where a banking association distributed three-fourths of its capital among its shareholders without providing for the payment of bill-holders, and the court impressed a trust in their favor upon the capital in the hands of the shareholders. So, again, where corporations have organized and engaged in business with a certain amount of ostensible and professed paid-up capital, but which was not in fact paid in, there are numerous cases in which the courts have set aside the arrangement by which the stock was called "paid-up," and impressed a trust upon the subscription of the shareholder in favor of subsequent creditors who relied upon, or whom the law would presume to have relied upon, the apparent and professed amount of capital. To this class belong many of the cases cited by plaintiff, as, for example, *Sawyer v. Hoag*, 17 Wall. 610; *Wetherbee v. Baker*, 35 N. J. Eq. 501.

While the courts have not always had occasion to state the limitations upon the doctrine that "the capital is a trust fund for the benefit of creditors," yet we think that it will be found that in every case where they have impressed a trust upon the subscription of the shareholders, it has been in favor of creditors becoming such afterwards, and hence fairly to be presumed as relying upon the amount of capital which the company was represented as having. We are referred to none, and have found none, where any such trust has been enforced in favor of creditors who have dealt with the corporation with full knowledge of the facts. The reason is apparent, for in such cases no fraud, actual or constructive, has been committed on such creditors. If a corporation issue new shares after the claim of a creditor arose, it is clear that the latter could not have dealt with the company on the faith of any capital represented by them. Whatever was contributed as capital in respect

of the new shares was a clear gain to the creditor's security. So, too, if a party deals with a corporation with full knowledge of the fact that its nominal paid-up capital has not in fact been paid for in money or property to the full amount of its par value, he deals solely on the faith of what has been actually paid in, and has no equitable right to insist on the contribution of a greater amount of capital by the shareholders than the corporation itself could claim as part of its assets. *Coit v. Gold Amalgamating Co.*, 14 Fed. Rep. 12, same case 119 U. S. 343, (7 Sup. Ct. Rep. 231.) This doctrine with respect to trusts has no application to a case where a party, like the plaintiff, was cognizant of the whole arrangement under which the stock of the defendant company was issued, and of what was paid or intended to be paid for it, and who accepted a novation of its debt with full knowledge of these facts, and received as great or greater security for it than it had before. To hold otherwise would be to perpetrate a fraud on the stockholders, and not on the creditors.

These views effectually dispose of the question of the liability of the defendants, at least on account of their old company and treasury stock. We think it also logically follows from what we have said that the defendants are not liable to the plaintiff upon their "pro rate" stock as for unpaid stock subscriptions. This stock had not been issued when plaintiff's debt was contracted. It could not have dealt with the company on the faith of any capital represented by these shares. In fact, it knew that no such capital had been paid in, unless the mining properties of the two old companies can be considered as represented in part by them; and the value of these properties remained the same, and they were equally available to creditors, whether represented by 100,000 shares or 250,000 shares of stock. Under such circumstances, the plaintiff has no equitable right to insist on the contribution of a greater amount of capital by the holders of these shares than the corporation itself could insist on. 2 Mor. Priv. Corp. §§ 832, 833.

Judgment affirmed.

COIT v. GOLD AMALGAMATING CO.

1886. 119 U. S. 343.¹

APPEAL from U. S. Circuit Court for Eastern District of Pennsylvania.

This was a bill in equity against a corporation and its stockholders to enforce a debt due from the former against the latter. The case is stated in the opinion of the Court.

Edward F. Hoffman, and *Charles Hart*, for appellant.

R. C. McMurtrie (*Pierce Archer* with him), for appellee.

FIELD, J. The defendant, the North Carolina Gold Amalgamating Company, was incorporated under the laws of North Carolina, on the 30th of January, 1874, for the purpose, among other things, of working, milling, smelting, reducing, and assaying ores and metals, with the power to purchase such property, real and personal, as might be necessary in its business, and to mortgage or sell the same.

The plaintiff is the holder of a judgment against the company for \$5489, recovered in the Court of Common Pleas of Philadelphia, on the 18th of May, 1879, upon its two drafts, one dated June 1st, 1874, and the other August 15th, 1874, each payable four months after its date. Unable to obtain satisfaction of this judgment upon execution, and finding that the company was insolvent, the plaintiff brought this suit to compel the stockholders to pay what he claims to be due and unpaid on the shares of the capital stock held by them, alleging that he had frequently applied to the officers of the company to institute a suit for that purpose, but that under various pretences they refused to take any action in the premises.

By its charter the minimum capital stock was fixed at \$100,000, divided into 1000 shares of \$100 each, with power to increase it from time to time, by a majority vote of the stockholders, to two million and a half of dollars. The charter provided that the subscription to the capital stock might be paid "in such instalments, in such manner, and in such property, real and personal," as a majority of the corporators might determine, and that the stockholders should not be liable for any loss, or damages, or be responsible beyond the assets of the company.

Previously to the charter, the corporators had been engaged in mining operations, conducting their business under the name and title which they took as a corporation. Upon obtaining the charter, the capital stock was paid by the property of the former association, which was estimated to be of the value of \$100,000, the shares being divided among the stockholders in proportion to their respective interests in the property. Each stockholder placed his estimate upon the property;

¹ Citations of counsel and part of opinion omitted. — ED.

and the average estimate amounted to \$137,500. This sum they reduced to \$100,000, inasmuch as the capital stock was to be of that amount.

The plaintiff contends, and it is the principal basis of his suit, that the valuation thus put upon the property was illegally and fraudulently made at an amount far above its actual value, averring that the property consisted only of a machine for crushing ores, the right to use a patent called the Crosby process, and the charter of the proposed organization; that the articles had no market or actual value, and, therefore, that the capital stock issued thereon was not fully paid, or paid to any substantial extent, and that the holders thereof were still liable to the corporation and its creditors for the unpaid subscription.

If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint. The case is very different from that in which subscriptions to stock are payable in cash, and where only a part of the instalments has been paid. In that case there is still a debt due to the corporation, which, if it become insolvent, may be sequestered in equity by the creditors, as a trust fund liable to the payment of their debts. But where full paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud. *Boynton v. Hatch*, 47 N. Y. 225; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Carr v. Le Fevre*, 27 Penn. St. 413.

But the allegation of intentional and fraudulent undervaluation of the property is not sustained by the evidence. The patent and the machinery had been used by the incorporators in their business, which was continued under the charter. They were immediately serviceable, and therefore had to the company a present value. The incorporators may have placed too high an estimate upon the property, but the court below finds that its valuation was honestly and fairly made; and there is only one item, the value of the chartered privileges, which is at all liable to any legal objection. But if that were deducted, the remaining amount would be so near to the aggregate capital that no implication could be raised against the entire good faith of the parties in the transaction.

[The learned Judge then *held* that the stockholders could not be called upon, by the plaintiff, to pay in the amount of a subsequent issue of stock, which was soon afterwards recalled and cancelled.]

*Judgment affirmed.*¹

¹ [See Taylor on Corporations, 3d ed., s. 522 c. Compare 111 Iowa, 664, pp 668-670; 19 Texas Civil Appeals, 507, p. 512. — Ed.]

IN RE H. AND M. TIN AND COPPER MINING CO.
SPARGO'S CASE.

1873. *Law Reports, 8 Chan. Ap.* 407.¹

APPEAL by Spargo from an order of the Vice-Warden of the Stannaries.

Michell and *Stephens* were licensees of a sett for twelve months from the 28th of January, 1871, with the right at any time within that period to call for a lease for twenty-one years. They and *Spargo* entered into arrangements for promoting a company to work this mine, and determined that its capital should be £3200, in sixty-four shares of £50 each; £16 per share to go for working capital, and £34 per share for the purchase of the mine, treating it as worth £2176. A company for that purpose was accordingly registered on the 9th of March, 1871, under the above name. The capital was stated by the memorandum of association to be £3200, in sixty-four shares of £50 each. *Spargo* subscribed the memorandum for thirty-one shares, two other persons for two shares each, and the remaining four subscribers for one share each. Neither *Michell* nor *Stephens* was a subscriber.

March 16, 1871, at a meeting at which all the seven subscribers were present, it was unanimously voted: "That the sum of £2176 be credited Mr. *Thomas Spargo* for the lease, &c., of the property, and that the same be paid out of the share capital of the company." In *Spargo's* account on the ledger of the company he was debited with the amount payable on his shares, and credited with the price of the lease (£2176), and with sundry items of cash, salaries, &c., which in the aggregate exactly balanced the sum payable on the shares.

Section 25 of the Companies Act of 1867 reads as follows: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

At a meeting of the company in September, 1871, it appeared that the lease had not yet been transferred to the company. It also appeared that, by an agreement previously entered into between *Spargo* and *Stephens* and *Michell*, *Spargo* was to receive one half the sum of £2176 for bringing out the company, the remaining half to be divided equally between *Stephens* and *Michell*. It was ultimately agreed that *Spargo* should pay £543 in cash, and transfer twenty shares to the company as a security for the transfer of the lease; the company undertaking to settle with *Stephens* and *Michell* out of the said money and shares, and to pay the balance in new shares and money to *Spargo*. *Spargo*

¹ Statement abridged. Arguments omitted. -- Ed.

handed over the £543, and transferred the twenty shares. No lease, however, was ever granted, difficulties having been raised as to its form on the part of the lessees.

The company having proved a failure, an order for winding it up was obtained Dec. 21, 1871.

The Vice-Warden, upon the application of the Registrar acting as liquidator, made an order upon *Spargo* to pay £50 per share on nine shares (all that were standing in his name at the commencement of the winding up); and also to pay a balance on other shares which he had parted with. From this order, *Spargo* appealed.

Roxburgh, Q. C., and *Woodroffe*, for appellant.

Fry, Q. C., and *Joseph Dixon*, contra.

SIR W. M. JAMES, L. J. I am of opinion in this case that the order of the Vice-Warden cannot stand.

The question turns upon what is the true intent and meaning of the 25th section of the *Companies Act*, 1867, which we had to consider very fully in *Fothergill's Case*, in which judgment was delivered yesterday by the Lord Chancellor and ourselves. In that case no doubt it was not necessary for us to lay down what would amount to "payment in cash," since we were clearly of opinion that there had not been any payment of cash or anything that could be called a payment of cash in that particular case, but it was said by the Lord Chancellor, and we entirely concurred with him, that it could not be right to put any construction upon that section which would lead to such an absurd and unjustifiable result as this, that an exchange of cheques would not be payment in cash, or that an order upon a banker to transfer money from the account of a man to the account of a company would not be a payment in cash. In truth, it appeared to me that anything which amounted to what would be in law sufficient evidence to support a plea of payment, would be a payment in cash within the meaning of this provision. The object of the section was, I apprehend, to prevent such contracts as had been before the Court in *Pellatt's Case*,¹ and *Elkington's Case*,² in which a man was to take shares, and to pay for them by supplying goods when wanted. It was considered that there was mischief in collateral contracts of that kind, which deprived creditors of the remedies which they would expect to have against persons whose names they saw registered on the list of shareholders. In *Fothergill's Case*,³ the bargain in effect was to give paid up shares in satisfaction of the money which was to be paid for other shares. But if a transaction resulted in this, that there was on the one side a *bonâ fide* debt payable in money at once for the purchase of property, and on the other side a *bonâ fide* liability to pay money at once on shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it did appear to me in *Fothergill's*

¹ Law Rep. 2 Ch. 527.

² Law Rep. 2 Ch. 511.

³ Law Rep. 8 Ch. 270.

Case, and does appear to me now, that this Act of Parliament did not make it necessary that the formality should be gone through of the money being handed over and taken back again; but that if the two demands are set off against each other the shares have been paid for in cash. If it came to this, that there was a debt in money payable immediately by the company to the shareholders, and an equal debt payable immediately by the shareholders to the company, and that each was accepted in full payment of the other, the company could have pleaded payment in an action brought against them, and the shareholder could have pleaded payment in cash in a corresponding action brought by the company against him for calls. Supposing the transaction to be an honest transaction, it would in a court of law be sufficient evidence in support of a plea of payment in cash, and it appears to me that it is sufficient for this Court sitting in a winding-up matter. Of course, one can easily conceive that the thing might have been a mere sham, or evasion, or trick, to get rid of the effect of the Act of Parliament, but any suggestion of sham, or fraud, or deceit seems to be entirely out of the question in this case, because everybody in the company knew of the transaction; every shareholder of the company was present, and was a party to the resolution; there was no deceit practised on any creditor, nor was there any registration of these shares, except as shares paid up. This seems to me to dispose of the case. It was argued, however, that the payment by the company was made for a consideration which has absolutely failed. If, however, the payment was made, the subsequent failure of the consideration could not prevent its being a payment, nor prevent its repayment by the shareholders from being a payment in full of the shares, though there might be an action or a bill by the company either for the return of the money or for damages, in case there was a subsequent failure to do something in respect of the property. But I see no trace whatever, no shadow of anything like what may be called a failure of consideration. What the parties were dealing with was a license or sett for a year, with a right to get a license or sett for twenty-one years. That was the property which the parties undertook to deal with. The company, with knowledge of all this, not only paid the £2176, in the manner which appears, to the Appellant, but afterwards made arrangements with him for satisfying the two other persons who were interested with him for their proportion of the property. After this disputes arose, not between this gentleman and themselves, but between the intending lessors and themselves; not as to the right of one to have the lease and the obligation of the other to grant a lease, but as to what would be the proper conveyancing language in which that lease was to be expressed. It appears to me that it would be an abuse of language to say that there was anything like a failure of consideration on the part of Mr. *Spargo*, which is to entitle the company to treat that payment as a payment never made, and to insist that the shares remain unpaid to this day. This applies to the forty-two shares as well as the nine

shares. Therefore, it is not necessary to discuss the question as to what we might do under the 101st section, if this were a case where Mr. *Spargo* had not paid up his shares, but they had been so dealt with that as between the company and the present holders they must be treated as paid up.

I am of opinion that the order of the Vice-Warden ought to be discharged with costs of the proceedings in the Vice-Warden's Court.

SIR G. MELLISH, L. J. I am of the same opinion. I gave my opinion in *Fothergill's Case*¹ yesterday, on the proper construction of the 25th section of the Act of 1867. I then stated that in my opinion, if the circumstances relied on would in an action for the money due upon shares be evidence only in support of a plea of accord and satisfaction, this section would prevent their being a good defence; but that if they would support a plea of payment, then the 25th section did not prevent their being a good defence. In the present case, I am of opinion that if an action were brought at law for the amount originally payable on these shares, there would be a valid defence under a plea of payment. Nothing is clearer than that if parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by *A.* to *B.*, and then handing it back again by *B.* to *A.*, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards.

HANDLEY v. STUTZ.

1891. 139 U. S. 417.²

APPEAL from U. S. Circuit Court for Middle District of Tennessee.

Bill in equity by creditors of Clifton Coal Company against the company and certain of its stockholders to compel an assessment and payment upon certain shares. The company was incorporated under the laws of Kentucky in 1883, with power to purchase, lease and operate coal mines; the stock being fixed at \$120,000, with power to increase to \$200,000 by majority vote. The original stock was taken and paid for, and the corporation began business at once.

In 1886, it was proposed to undertake the manufacture of coke. In order to obtain money for this purpose, the stockholders, on March

¹ Law Rep. 8 Ch. 270.

² Statement abridged. Part of opinion omitted. — Ed.

31, 1886, voted to issue bonds for \$50,000, secured by mortgage. The company did not succeed, at first, in selling the bonds. On May 31, 1886, at a meeting at which all the stockholders were present in person or by proxy, it was unanimously voted that the capital stock be increased to \$200,000. The company then proposed to give to purchasers of bonds \$1000 of stock as a gratuity with each \$1000 of bonds. On these terms bonds to the amount of \$45,000 were taken and paid for. Bonds for that amount were delivered to the subscribers with equal amounts of certificates of "paid-up stock," the receipts reciting that it "was issued with bonds for same amount, as per agreement." The certificates on their face recited that the shares of stock were fully paid up, and were non-assessable. Bonds for \$5000, not having been subscribed for, were left in a bank as collateral security for a loan to the company. The remaining shares of new stock (to the amount of \$30,000), which were not needed to secure subscribers to the bonds, appeared to have been distributed *pro ratâ* among the old stockholders.

At the hearing, where evidence was introduced tending to prove the foregoing facts and other facts hereinafter stated in the opinion, the Circuit Court held certain of the defendants liable to all the creditors of the company whose debts originated after the alleged increase of stock, and fixed May, 1886, as the date of such increase. As to debts contracted prior to that date, they were excluded because, as between the company and the stockholders, the latter held such stock properly, and without liability to the company, and all creditors who dealt with the company prior to such increase, and not upon the faith of such stock, had no equity to demand more than the company itself could.

Edward H. East, and *James Stuart Pilcher*, for appellants.

Walter Evans, and *James R. MacFarlane*, for appellees.

BROWN, J.

So far as the question of liability to the proposed assessments is concerned, these defendants, with respect to their relations to this corporation, are divisible into two distinct classes: First, those of the original stockholders who received the \$30,000 increased stock as a gift; second, those who subscribed to the \$50,000 bonds, and received an equal amount of stock, as a bonus or inducement to make the subscription.

4. With regard to the first class, namely, the original stockholders, who voted for this increase of 800 shares, and then distributed among themselves 300 of those shares, without the shadow of right or consideration, it is difficult to see why they should not be called upon to respond for their value.

[The remainder of the opinion on this point is omitted.]

5. Somewhat different considerations apply to those who subscribed for the bonds of the company, with the understanding that they were to receive an amount of stock equal to the bonds as an additional

inducement to their subscription. The facts connected with this transaction are substantially as follows: Some three years after the company was organized it became apparent that the enterprise, as originally contemplated, namely, the mining and selling of coal for steam and domestic purposes, was not likely to be a success, owing to the inferior character of the product; and the only hope of the company lay in the manufacture of the coal into an iron-making coke, that is, a coke containing a percentage of sulphur low enough to admit of the manufacture of merchantable pig iron. To embark in this, however, money was needed, and as the stock of the company was not worth more than 50 cents on the dollar, it was evident this could not be effected simply by the issue of new stock. It was proposed at the meeting in March that money should be raised by the issue of \$50,000 of bonds, with which to add the requisite structures to the plant. But it was soon evident that the bonds could not be negotiated without the stock, and, acting upon the suggestion of a Nashville banker, it was resolved at the meeting in May that the stock should be increased 800 shares, 500 of which should be turned over to the subscribers to the bonds, as a bonus or an additional consideration. The evidence is uncontradicted that the bonds could not have been negotiated without the stock; that they were both sold as a whole; that the transaction was in good faith, and, considering the risk that was taken by the subscribers, the price paid for the stock and bonds was fair and reasonable. The directors appear to have done all in their power to obtain the best possible terms, and there is no imputation of unfair dealing on the part of any one connected with the transaction. At that time the mines and property of the company were in good condition, and the prospects of success were fair.

The case then resolves itself into the question whether an active corporation, or as it is called in some cases, a "going concern," finding its original capital impaired by loss or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market and sell it for the best price that can be obtained. The question has never been directly raised before in this court, and we are not, consequently, embarrassed by any previous decisions on the point. In the *Upton Cases*, arising out of the failure of the Great Western Insurance Company; in *Hatch v. Dana*, 101 U. S. 205, and in *Hawkins v. Glenn*, 131 U. S. 319, the defendants were either original subscribers to the increased stock, at a price far below its par value, or transferees of such subscribers; and the stock was issued, not as in this case to purchase property or raise money, to add to the plant, and facilitate the operations of the company, but simply to increase its original stock in order to carry on a larger business, and the stock thus issued was treated as if it formed a part of the original capital. In *County of Morgan v. Allen*, 103 U. S.

498, the same principle was applied to a subscription by a county to the capital stock of a railroad company, for which it had issued its bonds, although such bonds had been surrendered to the county with the consent of certain of its creditors.

To say that a corporation may not, under the circumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation, in some form, the amount represented by it; but it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder, or the person of whom he purchased, has paid its par value for it. It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained; and so long as the transaction is *bona fide*, and not a mere cover for "watering" the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it. Of course no one would take stock so issued at a greater price than the original stock could be purchased for, and hence the ability to negotiate the stock and to raise the money must depend upon the fact whether the purchaser shall or shall not be called upon to respond for its par value. While, as before observed, the precise question has never been raised in this court, there are numerous decisions to the effect that the general rule that holders of stock, in favor of creditors, must respond for its par value, is subject to exceptions where the transaction is not a mere cover for an illegal increase.

Thus in *New Albany v. Burke*, 11 Wall. 96, a city subscribed to the stock of a railroad, and issued bonds for a part of the subscription, agreeing to issue them for the rest of it, when the road should be built to a certain point. The road relied mainly upon these bonds to raise the necessary money. The validity of the bonds being denied by taxpayers, who had filed bills to enjoin the raising of a tax to pay the interest, their value in the market was largely impaired, and it was found they could not be sold without a sacrifice. Under these circumstances the company applied to the city to pay a certain sum which had been borrowed by the road upon the pledge of the bonds already issued, with sundry other moneys, and in consideration thereof the city obtained from the company a large number of bonds which had not been negotiated, and a cancellation of the subscription. In

a suit brought by a judgment creditor to enforce the original subscription, it was held that the compromise was legal, and the payment of such subscription would not be enforced, although it subsequently turned out that the bonds were worth more than they could have been sold for. Said Mr. Justice Strong, speaking for the court: "Had the company sold to a stranger, and then the city become a purchaser from the stranger, it will not be contended that any creditor of the company could complain. And it can make no difference whether the purchase was made directly or indirectly from the first holder of the bonds, assuming that there was no fraud. The transaction . . . was, in substance, plainly nothing more than a purchase by the city of its own bonds, some of which had been issued and others of which it was under obligation to issue, at the call of the vendor. . . . Looking at it in the light of subsequent events, it was no doubt an advantageous purchase for the city; and, if the uncontradicted evidence is to be believed, it was deemed at the time an advantageous sale or arrangement for the company. . . . We may add, the evidence is convincing that the contract between the city and the company was made in the utmost good faith, with no intention to wrong creditors of the latter; that it was at the time considered advantageous to the company, and it is not proved that all was not paid for the bonds issued and to be issued that they could have been sold for in the market."

So in *Coit v. Gold Amalgamating Company*, 119 U. S. 343, it was held that where the charter of a corporation authorizes the capital stock to be paid for in property and the shareholders honestly and in good faith pay for their subscriptions in property instead of money, third parties have no ground of complaint, although a gross and obvious over-valuation of such property would be strong evidence of fraud in an action by a creditor to enforce personal liability. The court held that where full-paid stock was issued for property received there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. In delivering the judgment of the court in that case at the circuit, 14 Fed. Rep. 12, Mr. Justice Bradley observed: "That trust (in favor of creditors) does not arise absolutely in every case where capital stock has been issued, and where it has been settled for by arrangement with the company. It is not as if the stockholders had given their promissory notes for the amount, these notes being in the treasury of the company; but there are often equities to which the stockholders are entitled — on which they are to stand." As one of them, he mentioned the case of stock dividends fairly made in consideration of profits earned and of accumulations of the property of the company, and observed: "It is not true that it is in the power of a creditor in every case, and in all cases, as a mere matter of right, to institute an inquiry as to the valuation of the amount of the consideration given for the stock, and disturb fair arrangements for its payment in other ways than by cash. If the stock has been fairly created and

paid for, there is an end of trusts in favor of anybody; and this does not affect the general proposition that unpaid subscriptions of stock are a trust fund to be administered for the benefit of creditors after a corporation becomes insolvent."

A case nearer in point is that of *Clark v. Bever*, *ante*, 96, decided at the present term of this court. In this case, a railroad company, of which defendant's intestate was president and stockholder, had a settlement with a construction company, of which defendant's intestate was also a member, for work done in building the road. The railroad company, being unable to pay the claim of the construction company, delivered to it thirty-five hundred shares of its stock at 20 cents on the dollar, and the same were accepted in full satisfaction of the debt. The stock was not worth anything in the market, and was issued directly to the defendant's intestate. No other payment than the 20 per cent was ever made on account of this stock. A judgment creditor of the railroad company filed a bill to compel the payment by the defendant of his claim, upon the theory that he was liable for the actual par value of such stock, whatever may have been its market value at the time it was received. It was held he could not recover. "Of course, under this view," says Mr. Justice Harlan, in delivering the opinion of the court, "every one having claims against the railway company, — even laborers and employés, — who could get nothing except stock in payment of their demands, became bound, by accepting stock at its market value in payment, to account to unsatisfied judgment creditors for its full face value, although, at the time it was sought to make them liable, the corporation had ceased to exist, or its stock had remained, as it was when taken, absolutely worthless. . . . To say that a public corporation, charged with public duties, may not relieve itself from embarrassment by paying its debt in stock at its real value — there being no statute forbidding such a transaction, — without subjecting the creditor, surrendering his debt, to the liability attaching to stockholders who have agreed, expressly or impliedly, to pay the face value of stock subscribed by them, is, in effect, to compel them either to suspend operations the moment they become unable to pay their current debts, or to borrow money secured by mortgage upon the corporate property."

So in *Fogg v. Blair*, *ante*, 118, also decided at the present term, it was held to be competent for a railroad, exercising good faith, to use its bonds or stock in payment for the construction of its road, although it could not, as against creditors or stockholders, issue its stock as fully paid without getting some fair or reasonable equivalent for it. It was there said: "What was such an equivalent depends primarily upon the actual value of the stock at the time it was contracted to be issued, and upon the compensation which, under all the circumstances, the contractors were equitably entitled to receive for the particular work undertaken or done by them." It appeared in

that case that full and adequate compensation for the work done had been paid by the company in its mortgage bonds, and, as the bill contained no allegation whatever as to the real or market value of such stock, it was held that the contractors receiving this stock were not liable to creditors for its par value. It was added: "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors by the contract made with Blair and Taylor. If the plaintiff expected to recover in this suit on the ground that the stock was of substantial value, it was incumbent upon him to distinctly allege facts that would enable the court — assuming such facts to be true — to say that the contract between the railroad company and the contractors was one which, in the interest of creditors, ought to be closely scrutinized." It would seem to follow from this that if the stock had been of some value, that value, however much less than par, would have been the limit of the holder's liability.

In *Morrow v. Nashville Iron and Steel Co.*, 87 Tennessee, 262, 275, 276, the Supreme Court of Tennessee held, that a contract with a subscriber to stock of a corporation, that for every share subscribed he should receive bonds to an equal amount, secured by mortgage on the company's plant, is void as against creditors, and also between the subscriber and the corporation. But the court drew a distinction between such a case and sales of or subscription to the stock of an organized and going corporation. It said: "The necessities of the business of an organized company might demand an increase of capital stock, and if such stock is lawfully issued, it may very well be offered upon special terms. In such case, if the market price was less than par, it is clear that a purchaser or subscriber for such stock at its market value would, in the absence of fraud, be liable only for his contract price. So a case might arise where the stock of a going concern was much depreciated, and where its bonds were likewise below par, and there was lawful authority to issue additional stock and bonds. Now, in such case, the real market value of an equal amount of stock and bonds might not exceed, or even equal, the par value of either. In such cases, the question of fraud aside, a purchaser would only be held for his contract price." This case from Tennessee puts as an illustration the exact case with which we are now dealing.

The liability of a subscriber for the par value of increased stock taken by him may depend somewhat upon the circumstances under which, and the purposes for which, such increase was made. If it be merely for the purpose of adding to the original capital stock of the corporation, and enabling it to do a larger and more profitable business, such subscriber would stand practically upon the same basis as a subscriber to the original capital. But we think that an active corporation may, for the purpose of paying its debts, and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained. *Stein v. Howard*, 65 California, 616. As the company in this case found it

impossible to negotiate its bonds at par without the stock, and as the stock was issued for the purpose of enhancing the value of the bonds, and was taken by the subscribers to the bonds at a price fairly representing the value of both stock and bonds, we think the transaction should be sustained, and that the defendants cannot be called upon to respond for the par value of such stock, as if they had subscribed to the original stock of the company. Our conclusion upon this branch of the case disposes of it as to those who were held liable by virtue of their subscription to the bonds.

6. We have no doubt the learned circuit judge held correctly that it was only subsequent creditors who were entitled to enforce their claims against these stockholders, since it is only they who could, by any legal presumption, have trusted the company upon the faith of the increased stock. *First National Bank of Deadwood v. Gustin Minerva Consolidated Mining Company*, 44 N. W. Rep. 198; 2 Morawetz on Corporations, §§ 832-3; *Coit v. N. C. Gold Amalgamating Co.*, 14 Fed. Rep. 12. We also agree with him, that creditors who became such after the increase was voted in May, 1886, are entitled to look to those who subsequently received the stock, notwithstanding they did not receive it until after the debts had been contracted. The circuit judge found in this connection that the "complainants had no knowledge or notice of the subscription paper of December 30, 1886, under which \$45,000 of the new stock was distributed to those who subscribed for bonds, nor of the distribution among the old stockholders of \$30,000 of said increased stock, nor does it affirmatively appear that they or either of them dealt with and trusted the company upon the faith of that increased stock; but the fact that the capital stock had been increased to \$200,000 was made public and was generally known." The real question in this connection is—when may it be presumed creditors trusted the corporation upon the faith of the increased stock? Obviously, when such increase was ordered. That is a fact to which publicity would naturally be given; the creditors could not be expected to know when and by whom such stock would be taken. It is true they assume the risk of the stock not being taken at all, but the moment shares are taken, they are supposed to represent so much money put into the treasury as they are worth, which becomes available for the payment not only of future, but of existing creditors. It is manifest that any attempt to gauge the liability of stockholders by the exact time they took their stock with reference to the dates when the several claims of the creditors accrued, and by the further fact whether the creditors actually knew of and relied upon such stock, would, in a case like this, where the creditors and stockholders are both numerous, lead to inextricable confusion. Even the flexibility of a court of equity would be inadequate to adjust the rights of the parties.

Decree reversed, and cause remanded for further proceedings in conformity with this opinion.

FULLER, C. J. (dissenting). I dissent from the conclusion of the court in respect of the stock received by the subscribers to the bonds. That stock was not paid for in money or money's worth, or issued in payment of debts due from the company, or purchased at sale upon the market. It was a mere bonus, thrown in with the bonds as furnishing the inducement to the bond subscription, of larger control over the corporation, and of possible gain without expenditure. Becoming secured creditors through the bonds, the subscribers increased their power through the stock. In my view, there was no actual payment for the stock, and to treat it as paid up, is to sanction an arrangement to relieve those who would reap the benefit derived from the possession of the stock, in the event of the success, from liability for the consequences, in the event of the failure, of the enterprise.

When the capital stock of a corporation has become impaired, or the business in which it has engaged has proven so unremunerative as to call for a change, creditors at large may well demand that experiments at rehabilitation should not be conducted at their risk.

My brother LAMAR concurs with me in this dissent.

MELVIN v. LAMAR INSURANCE CO.

1875. 80 *Illinois*, 446.¹

ERROR to Superior Court of Cook County.

Bill of complaint, filed in 1873, by certain stockholders in the Lamar Insurance Company, of Chicago, on behalf of themselves and all others similarly situated, against the company, Cushman, Hardin, and others. The bill alleges that Cushman & Hardin, having subscribed for and taken 5500 shares, were afterwards improperly permitted to surrender said shares and to withdraw from the company all the assets which they had paid therefor; that, executions against the company having been returned unsatisfied, a receiver of the company has been appointed under a creditor's bill; that the terms of payment for stock, as provided by the by-laws, were 5 per cent cash and 15 per cent in three, six, and nine months, the remaining 80 per cent being included in a stock note subject to payment upon call by the directors; that the receiver, under the order of the court, has made a call of 20 per cent upon the stockholders, but that he ignored Cushman & Hardin as stockholders for 5500 shares, and their liability to refund the moneys withdrawn by them from the company. The bill prays that Cushman & Hardin be required to refund the money withdrawn by them, and that they be compelled

¹ Statement abridged. Portions of opinion omitted.—Ed.

to take the position of stockholders in respect to the 5500 shares which they surrendered.

Cushman & Hardin filed an answer.

Upon a hearing the following facts appeared :

The Lamar Insurance Company was incorporated in 1865 ; but the first stock was subscribed in 1869. Its assets being insufficient to authorize it to do business under the General Insurance Law of 1869, the State Auditor demanded, as a prerequisite to authorizing it to do business, that the company should have \$100,000 in acceptable securities and assets. In order to comply with this requirement, a written contract was entered into Sept. 17, 1869, between the company and Cushman & Hardin. By the first clause of this contract, Cushman & Hardin agreed to subscribe for and purchase 5500 shares, and to pay therefor the par value, \$550,000 ; the sum of \$110,000 to be paid in cash and in securities acceptable to the State Auditor, and the balance (80 per cent of the price) to be subject to a call of the stockholders. By a subsequent clause, it was agreed, in substance, that at the expiration of one year from date, at the election and request of Cushman & Hardin, the company should repurchase the stock from Cushman & Hardin, and should restore to them all that the company had received from them on account of the stock.

Under the above arrangement, certificates for 5500 shares were issued to Cushman & Hardin in the usual form ; and it so appeared upon the books of the company. Cushman & Hardin delivered to the company cash and acceptable securities to the amount of \$110,000. This transaction enabled the company to comply with the Auditor's demand that it should have \$100,000 ; and enabled the company to procure the Auditor's certificate and authority to do business.

The Superintendent of the Insurance Department in the office of the Auditor testified that, at that time, the president of the company and Hardin both assured him that the assets shown to him were the *bona fide* assets of the company ; that stock was issued to Cushman & Hardin in payment for the securities ; and that the certificates of stock were exhibited to him. There was also testimony that the company, in effect, represented to third persons that the assets furnished by Cushman & Hardin were part of the assets of the company and that the stock taken by Cushman & Hardin was part of the subscribed stock of the company ; and it was in evidence that some of these representations were made with the knowledge of Cushman & Hardin.

Subsequently to Sept. 17, 1869, there were subscriptions made by other persons to the stock of the company, to a very large amount.

Subsequently the stock issued to Cushman & Hardin was cancelled ; and all payments made by them therefor, either in money or securities, were repaid to them.

Upon the hearing the court below dismissed the bill.

John N. Jewett, and *Sidney Smith*, for plaintiffs in error.

Monroe, Bisbee & Ball, for defendants in error.

SHELDON, J. We have no doubt that, under the written contract of September 17, 1869, which was introduced in evidence with all its indorsements, Cushman & Hardin were actual stockholders in the Lamar Insurance Company, in respect to the 5500 shares of stock which were the subject matter of the contract, and that they did not take the shares merely as collateral security for a loan of \$110,000, in money and securities, as insisted upon in the defense, although the latter was the real transaction between the parties as intended by themselves.

This, then, is the condition of Cushman & Hardin in respect to these 5500 shares. Certificates of stock were issued to them in the usual form, and it so appeared upon the books of the company. The exhibition and representation of the certificates as *bona fide* certificates, and of the assets as *bona fide* assets, enabled the company to obtain the Auditor's certificate.

Cushman & Hardin held themselves out, and allowed others to represent them, as stockholders for that amount, or, that their stock was a part of the subscribed stock of the company. Thereafterward, subscriptions to the stock of the company were made to a large amount.

The persons thus subscribing had no reason to suspect that the stock taken by Cushman & Hardin stood upon any different footing from that which they received. They had a right to suppose that the 20 per cent upon these 5500 shares had been paid in, to remain permanent assets of the company for the payment of its debts, and that the remaining 80 per cent was, equally with the 80 per cent of the stock for which they subscribed, liable to be called in to supply any deficiency.

All subscriptions are presumably upon the same basis, and all shares entitled to the same benefits and subject to the same burdens. In the subscription of each person every other subscriber has a direct interest.

There purported here to have been a large amount of stock taken, whereas, in fact, there was really no stock taken—the issue of the shares to Cushman & Hardin being coupled with the right on their part to surrender them and take back their money. Such a private arrangement with an individual subscriber, although it may not be intended, is, in law, a fraud upon the other subscribers; and such agreement will be disregarded, and the party be held bound to all the responsibilities of a *bona fide* subscriber. This is the doctrine, as we regard, abundantly established by judicial decisions.

[The learned Judge here referred to *Blodgett v. Morrill*, 20 Vermont, 509; *White Mountain R. R. Co. v. Eastman*, 34 N. H. 124; *Robinson v. Pittsburgh & C. R. Co.*, 32 Pa. State, 334; *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. State, 489; *Stanhope's Case*, L. R. 1 Chan. Ap. 161; *Mangles v. Grand C. D. Co.*, 10 Simons, 519; *Preston v. Same*, 11 Simons, 327; *Minor v. Bank of Alexandria*, 1 Peters, 65; *Hervey v. Vermilion & A. R. Co.*, 17 Ohio, 187; *Downie v. White*, 12 Wisc. 176; and *Chandler v. Brown*, 77 Ill. 335. The opinion then proceeds:]

The subscribed capital stock of a corporation, as also all its other

property, is a trust fund for the benefit of the general creditors of the corporation, and its governing officers can not, by agreement with a stockholder, release him from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing for a valuable consideration. *Sawyer v. Hoag*, 17 Wall. 620; *New Albany v. Burke*, 11 id. 106. And no more can they do so, we conceive, to the prejudice of stockholders. See, also, *Selma and Tennessee Railroad Co. v. Tipton*, 5 Ala. 787; Ang. and Ames Corp. secs. 146, 535, 600, 1 Redf. on Railways, 206.

It is insisted by counsel for defendants in error that the authorities cited are distinguishable from the present case, in that they are cases where the subscription itself was unconditional, and it was sought to be avoided by setting up a collateral agreement, either made by parol or by some other disconnected writing; whereas, here, the conditional character of the subscription appears upon the face of the subscription itself—the written contract of Sept. 17, 1869; that a party has a right to make any condition he pleases to a subscription, provided the condition is expressed in the contract; that what he is forbidden to do, is to make an unconditional subscription, accompanied by a secret stipulation, parol or written. There would be more force in this position, did the transaction rest entirely in the contract of Sept. 17, 1869. Then, the only evidence of Cushman & Hardin's connection with the stock would show that they were *only conditionally* connected with it, and it might plausibly be said that subsequent subscribers for stock could not be deceived or misled thereby. But there is more than that contract. There were certificates of stock issued in the usual form, and it so appeared upon the books of the company.

Here were the evidences of the right in the stock. They were unaccompanied by any sign of a condition. They showed the stock taken to be real, *bona fide*, absolute stock—the same as all other issues of shares of stock. It is, we think, upon these latter evidences, the certificates of stock, and the books of the company showing their issue, that others would be entitled to rely, and rest upon, as showing the character of the stock taken; and that they should not be held bound to go back and take notice of an antecedent individual contract existing between the directors of the company and the takers of the shares. This being so, there would be here the same evil—the liability to be misled and deceived by these unconditional certificates of stock, and their so appearing on the books of the company—as there is in the case where there is but a mere subscription, and the unconditional subscription is accompanied by a separate, collateral agreement qualifying it. The absolute character of the certificates of stock is sought to be qualified by a separate individual contract, in the same manner that, in the other case, an unconditional subscription of stock is attempted to be qualified by a separate collateral agreement. The qualifying agreement would seem to be of as secret a nature in the one case as the other.

We must think that this case is brought within the principle of the authorities referred to, so as to render them applicable and of controlling effect.

It is said that the subscriber to the stock of an organized company is bound to know the state of the records of the company; and that every person who subscribed here, was bound to know what this contract of September 17, 1869, was. The record book of the company was destroyed in the fire, in Chicago, of October 8 and 9, 1871. There is conflicting evidence whether the contract was spread upon the records of the company or not. But assuming that it was, it would be most unreasonable to hold that the subscribers to the stock of this insurance company, scattered abroad as they were, should be held to be bound by any presumed notice of what was being done by the directors of the company in the city of Chicago, in matters affecting their interests as such stockholders. In *Stanhope's case*, above cited, it is held that the shareholders in a company are not bound to look into the management, and will not be held to have notice of everything which has been done by the directors, who may be assumed, by the stockholders, to have done their duty.

It is supposed by counsel for defendants in error that it was necessary that the complainants in the court below should have made proof that they were influenced, in subscribing for the stock of this corporation, by this pretended subscription of Cushman & Hardin, and it is said they have failed in doing so.

We see no distinct proof of this. But it must be supposed that they and other subscribers were thus influenced by the amount of the subscriptions which had been made to the stock of the company, a part whereof was this large amount taken by Cushman & Hardin.

Holding, as we do, that this option to surrender these shares of stock, and take back the money and securities, was invalid, and to be disregarded as a fraud against the other stockholders, the transaction of the directors of the company in the cancellation of the stock, and repayment of the money and securities, must be held here as of no effect.

It was not an independent, fair dealing in respect to the stock for a valuable consideration, but it was action had under the contract only, and but the allowance and carrying out of the exercise of the option of the contract, and equally invalid with the option itself.

[The learned Judge then *held*, that the action of the directors in surrendering the stock was not ratified by the stockholders at the annual meeting in 1871; and also that an agreement of release subsequently executed by a committee of the stockholders could not be sustained in a court of equity, and could not be set up in discharge of the liability of the defendants. The opinion concludes thus:]

It follows, from what has been said, that this \$110,000 was wrongfully withdrawn by Cushman & Hardin from the company, and should be refunded by them; that the cancellation of the 55,000 shares of stock, issued to Cushman & Hardin, should be disregarded, and they

still be regarded as stockholders in respect to such stock ; and in any assessment upon the stock of the company, those shares should be assessed equally with all the other stock. The decree, so far as respects Cushman and Hardin, will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

HUDDERSFIELD CANAL CO. v. BUCKLEY.

1796. 7 *Term Reports (Durnford & East)*, 36.¹

ACTION on the case against an original subscriber to recover various calls. All but one of the calls were made after the defendant had parted with his stock.

At the Assizes a verdict was given for plaintiff, subject to the opinion of the Court on a case stated, the material part of which is as follows :

By the act of incorporation, shares of £100 each shall be vested in the persons subscribing, and their executors, administrators, and assigns ; proprietors may sell shares ; an entry of the assignment of shares is to be made in the company's books ; and after such assignment the purchasers are to have shares in the profits and to be entitled to vote as proprietors. No share is to be sold after the call of any money until such money is paid.

The first call sued for was a call for £10, made July 11, 1794 ; £8 thereof not being payable until November, 1794, and February, 1795. On Aug. 6, 1794, the defendant sold five shares to Kelsall at a profit, and transferred his interest therein to Kelsall by a proper transfer, registered by the company's clerk. On Dec. 4, 1794, entries were made in the company's books, debiting the defendant with the full amount of his subscription, and crediting him with the same amount by transfer to Kelsall.

Defendant had paid the first proportion of the first call, being £2 per share ; and the remainder of that call, £8 on five shares, amounting to £40, he paid into court on the first count.

The other calls sued for were made in 1795.

Topping, for plaintiffs.

Yates, *contra*.

LORD KENYON, C. J. [Omitting opinion on other points.] But the last point is equally clear against the plaintiffs. And not entertaining any doubt upon it, as it is a matter of infinite moment to the great mass of property embarked in this kind of speculation, I think we ought not

¹ Arguments omitted. Only so much is given of the case and opinions as relates to a single point. — Ed.

to order a second argument lest an idea should go abroad that we have any doubts. On looking through the act of parliament, it is clear that the Legislature meant that the parties should only be liable to the payment of their shares so long as they individually continue members of this Company, that is, so long as they have property which constitutes them such. The persons, who have the right of voting, are to vote in respect of their shares. The act also says that persons who have subscribed and *their assigns* shall be deemed proprietors: but it would be ridiculous to determine that a person, after he has sold his shares in respect of possessing which only he became a proprietor, should still continue to be a proprietor. After assignment the assignees hold the shares on the same conditions, and are subject to the same rules and orders, as the original subscribers, and are to all intents and purposes substituted in the places of the original subscribers. One reason however now urged why the original subscribers should always continue responsible is, because perhaps the shares may be assigned to insolvent persons: but the Legislature, when they gave their sanction to this undertaking, did not suppose that it was a mere *South-sea* scheme; they thought it a beneficial undertaking for the public, and conceived they had introduced a sufficient check by enacting that, if the subscribers did not pay their money from time to time as they should be required by the committee, they should forfeit their respective shares; and that no subscriber should part with his share while he was in arrear to the Company. No mischief therefore is likely to ensue either to the Company or the public from this construction of the act. I think that every clause in the act of parliament leads to this conclusion, that the persons liable to the calls are those only who continue to be at the time when the calls are made members of this corporation. Here the defendant had assigned his shares, and that assignment had been entered in the Company's books, before the calls stated in the three last counts of the declaration were made, and therefore he is not liable to pay them: but he is liable for the calls stated in the first count, and not having paid them at the time, and the jury having given interest on them by way of damages, the plaintiffs are entitled to that last sum on the first count, the money paid into court on that count only covering the principal sum.

ASHHURST, J. There is no doubt respecting the principal question. The original subscribers have power to assign their shares to whomsoever they please: then it would be strange to say that after disposing of their shares they should still continue liable to all the burdens which are thrown on the owners of this property. The point however does not rest on general reasoning; for the only restriction imposed by the act on the power of alienation is that the owners shall not assign until all the money due at the time of assigning is paid: but in all other cases the subscribers may assign their shares, and discharge themselves from their liability to future calls by the assignment.

STEACY v. LITTLE ROCK & FORT SMITH R. R. CO.

1879. 5 *Dillon U. S. Circuit Court*, 348.¹

BILL IN EQUITY, by judgment creditors of the Little Rock & Fort Smith R. R. Company, against the company, and Atkins and Converse *et als.*, stockholders in the company; alleging, among other things, that Atkins and Converse are holders of unpaid stock, and seeking to compel them to pay the full par value of the stock. It appeared that the stock in question was originally issued by the company to Warren Fisher, Jr., the contractor for building the road. The charter gave the directors power to contract for work, labor, or materials, and to agree that the whole or any part thereof should be payable in the capital stock of the company. The directors made a contract, the validity of which is not disputed, to pay Fisher in bonds and stock of the company. By vote of the directors, bonds and stock were issued to Fisher in payment for work done; and by similar authority other stock was issued to Fisher in advance of being earned. Fisher did not complete his contract, and the road is now insolvent. It was alleged that he had received in bonds more than enough to pay for all he did under the contract. The stock which was issued as having been earned under the contract, and that which was issued in advance of being earned, were both in the same form, and alike purported to be paid-up stock.

The defendants, Atkins and Converse, never made an original subscription to the stock of the company, and they became holders of its shares by the purchase of the same in Boston, through brokers in the market, without any actual knowledge of the facts connected with its issue. The shares thus purchased by the defendants, Atkins and Converse, were shares which had been issued to Fisher by the company, under the resolutions and circumstances hereinbefore set forth; but whether these shares were shares which had been fully earned by Fisher, or shares which had been advanced to him in anticipation of work to be done, does not appear, nor is it possible, as counsel concede, ever to ascertain.

W. H. Winfield, B. F. Rice, M. L. Rice, and Thoroughman, for plaintiffs.

C. W. Huntington, for Atkins and Converse.

U. M. Rose, for other defendants.

DILLON, J. The ground of liability on the part of the defendants, Atkins and Converse, is that, in point of fact, none of the shares issued to Fisher were ever paid for; that he had received in bonds more in value than the work he performed under his contract was worth; that, not having complied with his contract, his agreement, contained in his construction contract with the company, to take the shares, must now

¹ Statement abridged. — ED.

be regarded and treated as an agreement to pay for the shares in cash; and that shares, not being negotiable in the sense of the law merchant, are open, in the hands of every holder, to all the equities which attach to them in the hands of the original taker; and, therefore, since Fisher, if he held the shares, could be compelled to pay for them by the company, or at all events, by its creditors, the present holders of such shares, although they are holders for value, and without actual notice of the equities in respect thereto as between Fisher and the company, are necessarily charged with the obligations which attach to the original subscriber or holder of the shares.

There is no allegation in the bills of complaint that the defendants, Atkins and Converse, were in any way interested in, or parties to, the contracts under which said shares of stock were issued, or that they had any knowledge of such contracts when they purchased their shares of stock. Neither is there any allegation in the bills of complaint that said defendants were parties or privies to any over-issue or over-payment of bonds or stock by said company to Fisher, Jr., or that the defendants had any knowledge or information that such alleged over-issues or over-payments had been made. Neither is there any allegation that the defendants had any knowledge or information that the shares of stock owned by them had not been paid for in full, or that they had any knowledge or information that their certificates of stock were issued in fraud of the rights of creditors.

Upon the allegations of the plaintiffs' bills, as well as upon the proofs, these defendants are to be treated as the *bona fide* purchasers and holders of the shares of stock by them severally owned.

The plaintiffs nowhere allege, indeed, that any shares of stock were issued to said Fisher, Jr., by said corporation, otherwise than in accordance with the terms of said contract, or that any shares were issued in excess of the stipulations of said contract.

It is our judgment, especially in view of the provisions of sections 17, 19, and 29 of the company's charter, before adverted to, that shares of stock issued as full-paid shares by authority of the board of directors, under the construction contract, which was never questioned by the company or its shareholders or creditors, and which is not assailed or impeached by the pleadings in the cause, and sold by the contractor as full-paid shares, to purchasers for value, without actual notice of the equities between the contractor and the company, if any there be, cannot be held subject to such equities, and to a liability to have shares thus issued and thus purchased treated as unpaid stock. No case holding such a doctrine was referred to by the learned counsel for the complainants, and it is confidently believed that no such judgment has ever been pronounced. It is difficult to perceive any principle of reason or law on which such a judgment could rest. The company have the power to issue its shares. It cannot, without special authority from the Legislature, issue its shares as full-paid without actual payment in money, or, at least, in money's worth. A leading object of the

creation of corporations and the issue of shares is that the shares may be transferred with all practicable facility. *Bank v. Lanier* (11 Wall. 369); *New York, etc. Railroad Co. v. Schuyler* (34 N. Y. 30, 82).

The company's directors and officers are the guardians of the company's rights. They ought not to issue shares in violation of their duty. They know whether the shares have been paid for or not. This the public have no means of knowing, and no effectual means for ascertaining. If the company's directors, or other authorized officers, commit a fraud upon the company in this respect, they are undoubtedly liable therefor. But can any one point out wherein the equities of the creditor of a company thus defrauded by its officers is superior to the equities of those who have acted upon the representations of such officers within the scope of their powers, accredited by resolutions of the directors and authenticated by the corporate seal, and upon such solemn assurances purchased the shares of the company? Grant that the capital stock is a trust fund for the benefit of creditors, yet this trust cannot be followed, any more than other trusts, into the hands of *bona fide* purchasers for value. Per SWAYNE, J., in *Sanger v. Upton* (91 U. S. 56, 60).

What contract did the defendants Atkins and Converse make? They made a contract to buy, and did buy, what the company had issued and represented to be full-paid shares, without notice that this representation was untrue. If the representation thus made is true, they are under no liability again to pay for the shares. If the shares had been represented to have been unpaid, *non constat* that they would have purchased them. Clearly the company would be estopped to make the claim here advanced by its creditors.

Again, we ask, in what consists the superior equity of the creditor over the obvious equities which exist in favor of such a purchaser of the company's shares. The creditor trusted that the company's officers would not violate their duty; the purchaser trusted that they had not violated their duty.

The rights and obligations of a *bona fide* transferee of shares purporting to be full-paid shares are different from the rights and obligations of the transferee of shares which do not purport to be full-paid. In cases where the certificates show on their face that the shares have been paid in part only, the law implies a promise by the transferee to pay the balance due upon the shares upon calls when he has come into privacy with the company. *Webster v. Upton* (91 U. S. 65, 69); *Upton v. Tribilcock* (Ib. 45). Such an implied promise rests upon the reasonable and obvious ground that the transferee has knowingly and voluntarily assumed the liability of the transferor. But upon what ground can the law raise a promise to pay the balance due upon shares when the company has asserted, and the purchaser acts upon the assurance, that the shares have been fully paid?

The question here urged by the complainants is settled by the universal practice of business men, as well as by the judgments of the

courts. Millions of dollars of stocks are sold in this country every week, and there is no practice on the part of purchasers, and no understanding that the law requires of them, that they shall ascertain *alibunde* the representations of the company's authorized officers that certificates of full-paid stock have in fact been fully paid. How could a purchaser ascertain this fact? Must he go to the records of the particular corporation, in a remote and distant State it may be, and make an examination before he can safely buy? What more value is to be placed upon facts stated in the records than upon those stated under the corporate seal, by the authorized officers, as respects matters *intra vires*? Officers who would state a falsehood on the certificate of stock would state it on the corporate records, if this were necessary to make the intended fraud effectual. And, hence, the duty so much insisted on in argument, that a purchaser is bound to know the facts appearing on the corporate records, in addition to its being an impracticable duty, would, if discharged, be valueless as a guaranty against frauds upon creditors. Besides, on what principle is it that a purchaser of the company's shares is to be held to be the guardian of the rights of the company's creditors and bound to protect them? But the exigencies of this case do not require us to go so far, since, if we concede that a *bona fide* transferee for value of full-paid shares is charged with knowledge of all the facts concerning those shares appearing on the records of the corporation, there is nothing therein disclosed which shows that the shares purchased by Atkins and Converse had not been paid for by Fisher under his contract. The company's records show that a large amount of stock had been earned by Fisher and ordered to be issued, and under the 29th section of the charter other stock was ordered to be advanced to him, on his giving bond to the company to pay for the same under his construction contract, the validity of which was not questioned by the company or any of its shareholders.

But the question here presented does not rest alone upon general reasoning. The subject was somewhat considered by the circuit court for the eastern district of Missouri, in *Phelan v. Hazard* (Cent. Law Jour. Feb. 8, 1878, p. 109; *ante*, 45). That was a suit brought by a single creditor of an insolvent corporation to enforce the liability of a stockholder for the unpaid balance of his stock. The shares had been issued in payment for a mining property which the corporation had purchased. The plaintiff did not undertake to impeach as fraudulent this transaction between the corporation and the original shareholders, but simply claimed that the shares of stock had not been paid for, either by the person to whom they were originally issued or by the defendant, the transferee and present holder of the shares. The court, after stating that the proof showed that the shares in question had been paid for precisely as they were originally agreed to be paid for, viz., by a conveyance of the mining property of the corporation, and that the conveyance had been received and recorded by the corporation, says: "Unless this agreement is rescinded or set aside for fraud,

how can it be said that the stock has not been paid for? The parties have agreed that it has been paid for, and that agreement is conclusive unless it is rescinded or impeached for fraud, and this cannot be done unless the attack is directly made. Undoubtedly such an attack could be made while the stock was in the hands of the original takers of it; but it is not so clear that it could be made by a subsequent creditor of the corporation against a transferee of the stock for value, who purchased the same in good faith as full-paid stock, relying upon the records of the corporation, which showed the shares to have been fully paid for, and the manner in which the payment had been made."

Subsequently the similar case of *Foreman, Assignee, etc. v. Bigelow et al.* (Cent. Law Jour. Nov. 29, 1878, p. 430) came before the circuit court for Massachusetts, and it was decided that a *bona fide* purchaser of full-paid shares was not liable to be assessed upon his shares. The opinion of Mr. Justice Clifford is very full, and we forbear going over ground so exhaustively covered in his judgment.

A long line of English cases under the Companies Acts, referred to in the opinions in the two American cases last cited, had established the principle that stock need not necessarily be paid for in cash, — that it might be paid for in money's worth. This doctrine had led to such abuses as to cause Parliament to insert in the Companies Act of 1867 the following provision:—

"SECT. 25. Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint stock companies at or before the issue of such shares."

The construction and effect of this section came before the court in *Nichols' Case* (Law Rep. 7 Ch. 533). In that case a company issued certificates of shares as fully paid up, when in fact no payment had been made, nor contract registered under the provisions of the Companies Act of 1867, section 25. At the date of the winding up of the company some of these shares were held by N., who had no notice that they were not fully paid up. It was held (reversing the decision of Hall, vice-chancellor) that by the issue of the certificates the company were estopped from alleging that the shares were not paid up, and that N. could not be placed on the list of contributories in respect of them as unpaid shares.

An appeal was taken by the liquidator, and the appeal was dismissed by the House of Lords (26 W. R. 819). In giving judgment, Lord CAIRNS, after quoting the aforementioned section 25 of the Act of 1867, said: "The effect of the section is very simple. Before the passing of the act it was open to any holder of shares to say, 'I have made a contract that I shall not be called on to pay up the value of these shares;' but the abuse of such contracts led to a statutory provision, making it a condition that no shares be treated as fully paid unless their value is paid in cash, or unless publicity is insured by a

written contract duly filed in the manner provided for. If Goulton had been called upon to pay up the value of his shares, this section would have deprived him of any defence; but we have now to consider the case of a *bona fide* transfer for value, and I want to know how the section can affect such a transaction. It leaves untouched the question of payment, and says nothing as to evidence of payment; but if the company gives a receipt for the amount of the shares, and this receipt passes to a purchaser who does not know that no actual payment has been made, his title must not be prejudiced by the statute. He receives a representation to the effect that the law has been complied with, and it would paralyze the whole trade in companies' shares if a person taking shares with a representation that they are fully paid up must disregard this assertion and satisfy himself of the fact by personal inquiry, especially as he might have considerable difficulty in obtaining accurate information as to the fact of payment or non-payment. Much was said as to the burden of proof and as to the necessity for showing an absence of notice. If the shares come, in the regular course of business, into the hands of a purchaser for valuable consideration, those who challenge the transaction must prove that such purchaser had notice of the fact." Lords HATHERLEY, SELBOURNE, and BLACKBURN each gave opinions in concurrence, and Lord GORDON concurred without delivering a separate opinion.

CALDWELL, J., concurred.

Bill dismissed.

CHAPTER XXV.

STATUTORY LIABILITY OF STOCKHOLDER TO CREDITOR
OF CORPORATION, OVER AND ABOVE STOCKHOLD-
ER'S LIABILITY TO PAY IN FULL THE AMOUNT SUB-
SCRIBED BY HIM FOR STOCK.

CARR v. IGLEHART.

1854. 3 *Ohio State*, 457.¹

RESERVED in Hamilton county.

Oliver, for complainant.

Coffin & Mitchell, for defendant.

PER CURIAM. This is a bill in chancery to collect the amount due upon three bank bills, issued by the Lebanon Miami Banking Company, for the payment, in the aggregate, of the sum of five dollars. It is founded upon the idea that the defendants, who were stockholders in the bank when the bills were issued, are individually liable for its debts. This liability is not deduced from any independent contract by which they undertook to pay the debts, for no such contract is alleged. Nor does it rest upon the ground that they have received the assets of the corporation which were bound for its liabilities, for no such fact is stated. Nor is it pretended that there is, in the charter of the bank, any provision, that, either expressly or by necessary implication, makes its stockholders personally responsible. It is upon neither of these grounds that relief is sought. The ground upon which we are asked to sustain the bill is, that stockholders in a corporation are individually liable for its debts, unless, by some provision of the charter or statute law, they are exempted from such responsibility. The counsel for the complainant admits that Blackstone, and divers other eminent writers upon the law, and also certain courts, have entertained a contrary opinion; but he is very clear they were all wrong, and he hopes and

¹ Only so much of the opinion is given as relates to a single point. — ED.

thinks this court will not be governed by such loose and inconsiderate expressions, either of text-writers or judges.

After a careful consideration of the elaborate and learned argument of counsel, we are unable to perceive that he has established the liability of the defendants. We suppose that no law is better settled than that they are not liable.

Again, the subject of this suit is too trivial.

[The opinion on this point is omitted.]

For the reasons stated, the demurrer to the bill must be sustained, and the bill dismissed.

TRUSTEES OF FREE SCHOOLS IN ANDOVER v. FLINT.

1847. 13 *Metcalf* (Mass.), 539.

THIS was an action of assumpsit, to recover the amount of the following note: "Andover, August 1st 1836. The Andover Mechanic Association, for value received, promise to pay to the Trustees of the Free Schools in the South Parish in Andover, or their order, three hundred ninety eight dollars, forty one cents, on demand with interest. John Flint, Treasurer." On the back of this note were six indorsements of a year's interest; the last indorsement bearing date October 4th 1842.

The parties submitted the case to the court upon the following agreed statement of facts: The plaintiffs were incorporated by *St.* 1801, c. 9. The Andover Mechanic Association was incorporated by *St.* 1821, c. 40, "with power," among other things, "to make by-laws for the management of said corporation and its funds, and to have all the privileges usually given, by acts of incorporation, to charitable societies." On the 27th of February 1822, at a meeting of said association, certain by-laws were adopted, which were afterwards printed and distributed, the eleventh article of which was in these words: "The members of this association pledge themselves, in their individual as well as their collective capacity, to be responsible for all moneys loaned to this association, and for payment of which the treasurer may have given his obligation agreeably to the direction of the directors."

The plaintiffs recovered judgment against said association, on the note which is now sought to be enforced against the defendant, and took out execution on said judgment, which execution was returned wholly unsatisfied, before the commencement of this action. Before this action was commenced, to wit, on the 16th of October 1845, the plaintiffs made a demand on the defendant, as a member of said association, to pay the sum now sought to be recovered. The defendant has been a member of said association from the time of its organization to the present time, and was treasurer thereof from its organiza-

tion to the 1st of January 1840. The number of the members of said association is about thirty.

The plaintiffs offer to prove, (if the proof be admissible,) by one witness, that she was a creditor of said association; that her demand remained unpaid; that when she lent money to said association, the defendant was treasurer; that she inquired of him as to the security of said corporation, and that he, in reply, informed her that the individual members of said association were liable for its debts; and that the same statement was made to her by the defendant's successor in the office of treasurer.

The plaintiffs also offer to prove by another creditor of said corporation, that when he made a loan to said corporation, the defendant was treasurer, and that he stated to the witness that he considered the individual members of the corporation liable for its debts, and at the same time furnished the witness with a copy of the said by-laws: That the witness gave said copy to another person, who will testify that he afterwards made a loan to said corporation, being induced by, and under the supposition of, the liability of the members.

The plaintiffs also offer to prove, by the testimony of a member of said association, that he and the other members thereof, so far as he knows, considered themselves liable individually for its debts; that he had attended their meetings, at which he had heard the subject spoken of by members; but that he does not know whether the defendant was present at those meetings.

The said association, on the 25th of April 1845, made an assignment for the benefit of its creditors; but the plaintiffs refused to become parties thereto.

At the time of the loan of the money sought to be recovered in this action, the defendant was treasurer of the Trustees of the Free Schools in the South Parish in Andover, (the plaintiffs,) as well as treasurer of the said Andover Mechanic Association. He resigned the office of treasurer of the plaintiffs on the 12th of December 1836.

If the aforesaid testimony be admissible, the court may draw the same conclusions therefrom which a jury would be bound to draw.

Stevens, for the plaintiffs.

Hazen, for the defendant.

DEWEY, J. The original contract was made by the plaintiffs with the Andover Mechanic Association. The plaintiffs received, for the money lent to that corporation, their negotiable note duly signed by their treasurer. Such was the form of the contract, and such has been the character given to the original promise, in the subsequent steps taken by the plaintiffs to enforce the collection of this demand. No liability, on the part of the defendant, arises from the force of the instrument given to the plaintiffs; but, if it exist at all, it is to be established by independent facts creating such liability, or by some legal enactment charging the defendant for the debts of the corporation.

Upon looking at the act incorporating the Andover Mechanic Association (*St.* 1821, *c.* 40,) we find it in the usual form of acts of incorporation, giving a corporate name and corporate powers, but imposing no individual liability on its members for the debts of the corporation. Individual liability, as incident to membership of a corporation, arises only from express legislative enactment, either in the charter, or by some general law, to which all similar corporations and their individual members are made subject. But there is no general law applicable to this species of corporations, such as exists in reference to manufacturing corporations, or corporations for banking purposes, providing certain liabilities on the individual stockholders of such corporations, in certain specified cases.

The plaintiffs, aware of this difficulty in any attempt to charge the defendant, by force of the provisions in the act of incorporation, or by reason of any general law imposing such liability on the defendant for the debts of the corporation, seek to establish their right to recover, in the present action, upon other grounds. For this purpose they rely upon the eleventh article of the by-laws of the corporation, adopted by its members soon after the passing of the act of incorporation. That by-law is in these words: [Here the judge recited the by-law, as set forth, *ante*, page 876.] The only effect that can be given to this by-law is that of an act or vote of the members of the corporation acting in their corporate capacity. It is not the act of any individual member, nor does the fact of its being found upon the records of the corporation, as a vote duly adopted, authorize the inference that all or that any number greater than a bare majority voted for its adoption. The question then arises, whether it be competent for an aggregate corporation, whose act of incorporation imposes no individual liability upon its members for the debts and contracts of such corporation, to render, by force of a by-law, each individual member a guarantor or surety for all moneys lent to the corporation. It is clearly quite foreign from the general purposes and objects, in reference to which by-laws are authorized to be made by corporate bodies. See *Rev. Sts. c.* 44, § 2, giving authority to corporations to make by-laws.

It is not, in the opinion of the court, within the corporate powers conferred upon this and similar corporations, to impose upon their members, by any such by-law, any personal and individual liability to third persons, beyond such as are specified in the charter, or in the general laws of the Commonwealth. Such a power would be liable to great abuse, and would subject every member of a corporation, however liberal its charter in excluding individual liability, to be made responsible for the entire indebtedness of the corporation by the act of a majority of those convened at a meeting of such corporation. Take the case of a bank in doubtful credit, and its active managers deem it useful to sustain it by pledging the individual responsibility of some of its more wealthy stockholders. Can they, by a corporate vote, impose upon all the stockholders a personal liability for all the debts of the

corporation? We think not, and are of opinion that each stockholder, by becoming such, subjects himself to no liability beyond that created by the force of the charter itself, or declared by other statutes of the Commonwealth.

Nor does the proposed evidence of the declarations of the defendant, that such individual liability existed in the present case, authorize the maintaining of this action. He might have mistaken his legal rights; he might have supposed such would be the effect of the by-law referred to, and therefore have made the admission. It is to be borne in mind that these declarations of the defendant were not made to the plaintiffe, but to other persons. The proposed evidence would therefore be inadmissible on a trial of this case before a jury; as it would not tend to charge the defendant. Whether for such false representations he may be held responsible to those to whom he made them, and who may have lent their money upon the faith of them, is a question not now before us. It is a fatal objection to the maintenance of the present action, that the defendant has never, by any valid legal contract, bound himself individually for the payment of the loan made by the plaintiffs to the Mechanic Association. His name was never subscribed to the pledge of the corporation, that the individual members would guaranty the debts of the corporation. His oral promises, if made, would be inoperative and void, by reason of the statute of frauds. To give any legal effect to these pledges of individual liability, they must have been the individual acts of the members, adopted and sanctioned by them by their signatures, under their own hands. Without this, the corporate act was a dead letter, and of no binding efficacy upon individual members in their personal capacity.

We see no ground upon which this action can be maintained.

Judgment for the defendant

IRELAND v. PALESTINE, &c. TURNPIKE CO.

1869. 19 *Ohio State*, 369.¹

ERROR to the court of common pleas of Preble county. Reserved in the district court.

The defendant in error was organized as a corporation, in January, 1852, under a law of this State, passed in 1849, for the purpose of constructing a turnpike road. The plaintiff in error was one of the subscribers to the stock of the company, and has fully paid up his subscription; and the law under which the company organized imposed no individual liability upon the stockholders beyond the amount of their subscriptions.

¹ Arguments and part of opinion omitted. — Ed.

By the act of May 3d, 1852 (S. & C. 289), turnpike companies, who should accept the provisions of said act, were authorized, when they found it necessary for the completion of their roads, or for the payment of indebtedness incurred in their construction, to issue bonds for that purpose; and the stockholders of all companies accepting the act were declared to be individually liable, to the amount of their stock, for the payment of bonds so issued for the completion of the road.

By the act of April 8th, 1856 (S. & C. 338), it is provided that in all cases where the stockholders of such companies are individually liable for the debts of the company, the stockholders may, if a majority of them so determine at a meeting called for that purpose, be assessed upon their stock, and compelled to pay to the company their *pro rata* of the indebtedness of the company, not exceeding the amount of their stock.

In 1854, the company having partly constructed its road, and being largely in debt, and without means to complete the road, the board of directors accepted the provisions of said act of May 3d, 1852, and issued and sold its bonds for the necessary amount to complete the road.

In October, 1856, the bonds having matured, and the company being without other means to pay them, in pursuance of the provisions of said act of April 8th, 1856, a meeting of the stockholders was called, and by a unanimous vote of those present, a general assessment was made upon the stockholders for the necessary amount to pay the bonds. The plaintiff in error was not present at the meeting, and did not participate in the proceedings, or give his assent thereto. He refused to pay his assessment; and to recover the same the company brought an action against him in the court of common pleas. In that court judgment was rendered in favor of the company for the amount of the assessment. To reverse that judgment, the present plaintiff filed his petition in error in the district court, and the same was therein reserved to this court for decision.

There are numerous assignments of error, growing out of defences set up, and the pleadings and evidence in the case, which it is unnecessary to notice here, for the reason that this court disposes of the case upon a single question, to fully understand which it is only essential to set forth the facts above mentioned. These facts substantially appear in the original petition, and the question decided by this court is simply whether these facts make a case entitling the company to recover.

Robert Miller and A. Haines, for plaintiff in error.

Campbell & Gilmore, for defendant in error.

WELCH, J. In our judgment, the act of May 3d, 1852, in so far as it authorizes assessments against stockholders who have paid the full amount of their subscriptions, and who by the charter of the company, or the laws under which it was organized, were not individually liable for its debts, is unconstitutional. It impairs the validity of the con-

tract between the company and the stockholder. In a contract between the company and a stockholder, or in an action by the former, or its creditors, against the latter, the stockholder is to be regarded as an individual person, separate and distinct from the corporation. He becomes a stockholder by virtue of a contract with the company, and he has a right to stand upon the terms of that contract, interpreted and limited by the laws under which it was made. By his contract with this company Ireland agreed to pay a specified sum, and no more. This sum he has fully paid, and to require him to contribute an additional amount, would be to violate the contract between the parties. Let it be understood that the amount for which a stockholder becomes liable to the company by his subscription is not limited by his contract, but by the discretion of the directors, or the stockholders at large, and no prudent man will subscribe for stock in a corporation. If such be the law, it is of little importance to the subscriber whether the amount of stock taken be large or small, because it can be indefinitely increased at the pleasure of the company, whenever the legislature sees proper to give the power to do so. If a subscriber contracts to pay a sum which he deems within his means of payment, he may be called upon to contribute an amount utterly beyond those means, and which may render him bankrupt. No subscriber would be safe under such a law, or have any rule by which to determine the amount of stock he could afford to take. In vain would he look to the charter of the company, or to the provisions of the constitution and subsisting laws of the State, to learn the nature and extent of the liability he was about to incur, if that liability can, at the pleasure of the legislature, be indefinitely increased or modified by retroactive laws.

We fully agree with counsel, that the stockholder may waive his constitutional right, and become liable by his own act or consent. For this purpose, it is not even necessary he should give his express or direct consent. It may be implied or he may be estopped from denying it by his acts or by his silence and apparent acquiescence. The case of *Zabriskie v. C. C. & C. R. R. Co.*, 23 Howard (U. S.) R. 381, and other authorities cited by counsel, fully establish this. But there is nothing in the present case, either in the company's petition or in the bill of exceptions, to show any such assent or acquiescence on the part of Ireland. He is not shown to have been present at the meeting of the directors, when the bonds were ordered to be issued, nor at the meeting of the stockholders, when the assessment was made. We cannot presume his assent to these proceedings, or his acquiescence in them, from the mere fact that they took place. The burden of showing such assent or acquiescence rests with the company, or other party seeking to hold him liable, or to estop him from denying his liability. Nor was this, in our judgment, a matter as to which the directors, or even a majority of the stockholders, were authorized by law to act for him. The power of a corporation over the rights of a stockholder, whether

that power is to be exercised by the directors or by a majority of the stockholders, is limited to his rights in the corporate property and corporate concerns, and does not extend to his private and individual property. As to the latter, the stockholder gives the company no authority whatever beyond the amount of his subscription, and no subsequent legislative grant of such power will be valid without his assent. This distinction, between the private and the corporate rights of the stockholder, should never be lost sight of in construing the authorities on this subject; and its application will go far to reconcile many of those which appear to be conflicting. It will be observed that in the case cited in 23 Howard, and in fact in all the authorities relied on by counsel for defendant in error, the new power sought to be exercised was confined to the assets and property of the corporation. By becoming a member, the stockholder places a specified amount of his private property in the common fund, and subjects it to the control of the company, according to its laws and regulations; but he grants no power whatever over the remainder of his private property, which is wholly unaffected thereby. As to the latter, the company has no more authority than it has over the property or rights of a stranger. I apprehend the true rule in such cases to be, that the power of a majority of the members to accept an amendment of the charter, so as to bind the minority, is confined to such modifications of the charter as are reasonably within the original objects of the incorporation, and as regard the corporate property, and that in all other cases the stockholders can only be bound by their individual assent or acquiescence.

We are of opinion that the court of common pleas erred in rendering judgment for plaintiff below upon the case made in the petition and the facts appearing in the bill of exceptions, and that the judgment must be reversed.¹

BRINKERHOFF, C.J., and SCOTT, WHITE, and DAY, JJ., concurred.

¹ As to power to assess: see *Enterprise Ditch Co. v. Moffitt*, A. D. 1899, 58 Nebraska, 842; *Redkey & Co. v. Orr*, A. D. 1901, Appellate Court of Indiana, 60 Northeastern Reporter, 716; *Duluth Club v. McDonald*, A. D. 1898, 74 Minnesota, 254.

Compare 1 Cook on Corporations, 4th ed., s. 242, and 2 *Ibid.* s. 497, with DOB, C. J., in *Dow v. Northern R. R.*, A. D. 1887, 67 New Hampshire, 1, p. 22. — ED.

SHAW, C. J., IN GRAY v. COFFIN.

1852. 9 *Cushing* (Mass.), 199.

To create any individual liability of members for the debt of a corporation, a body politic, created by law, and regarded as a legal being, distinct from that of all the members composing it, and capable of contracting and being contracted with as a person, is a wide departure from established rules of law, founded in considerations of public policy, and depending solely upon provisions of positive law. It is, therefore, to be construed strictly, and not extended beyond the limits to which it is plainly carried by such provisions of statute.¹

¹ "Statutory liability" must, of course, depend, in every case, upon the terms of the particular statute in question. Legislative enactments on this subject have varied widely in different States at the same date, and in the same State at different dates. Owing to this diversity in the statutes, the decisions in one State may frequently afford very little assistance in other States. In the first edition of this work a space of more than fifty pages was occupied by cases bearing on questions likely to occur under this kind of legislation. It has not been thought expedient to reprint those cases in this edition.

The cases in the first edition, which have been omitted here, are as follows: *Moyer v. Pa. Slate Co.*, 71 Pa. State, 293; *Rider v. Fritchey*, 49 Oh. State, 285; *Brown v. Eastern Slate Co.*, 134 Mass. 590; *Harger v. McCullough*, 2 Denio (N. Y.), 119; *Willis v. Mabon*, 48 Minnesota, 140; *Cochran v. Wiechers*, 119 New York, 399; *Diversey v. Smith*, 103 Illinois, 378; *Flash v. Conn.*, 109 U. S. 371; *Derrickson v. Smith*, 27 New Jersey Law (3 Dutcher), 166; *Huntington v. Attrill*, L. R. (1893), App. Cases, 150; *Marshall v. Sherman*, 148 New York, 9.

If the last four cases had been reinserted in the present edition, reference would probably have been made, in that connection, to the following recent decisions: *Whitman v. National Bank of Oxford*, 176 U. S. 559; *Crippen v. Loughton*, 69 New Hampshire, 540; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39; *Howarth v. Lombard*, 175 Mass. 570. — Ed.

CHAPTER XXVI.

POWER OF CORPORATION TO BECOME A MEMBER OF
A COPARTNERSHIP OR TRUST. — CORPORATION
FORMED FOR THE PURPOSE OF ESTABLISHING A
MONOPOLY.

WHITTENTON MILLS v. UPTON.

1858. 10 *Gray (Mass.)*, 582.¹

PETITION by a manufacturing corporation to set aside proceedings in insolvency, instituted against the corporation and William Mason, as partners, upon Mason's petition; also to restrain the assignees appointed under those proceedings from further interfering with their estate; and to compel the judge of insolvency to entertain a petition of the corporation for the benefit of the insolvent laws respecting insolvent corporations.

The following facts appeared by the report of a special master in chancery:

The Whittenton Mills were incorporated by *Statute* 1836, Chapter 19, for the purpose of manufacturing cotton goods. Before 1850, an agreement of copartnership was entered into between the Whittenton Mills and W. Mason. This partnership, under the firm name of William Mason & Company, carried on an extensive business in the manufacturing of machinery for cotton mills; afterwards adding the business of manufacturing locomotive engines. Mason contributed to the copartnership nothing but his skill and patent rights. The Whittenton Mills contributed all the capital required. In 1857 the Whittenton Mills, which had continued the business of manufacturing goods, and the said firm of William Mason & Company, both became insolvent. Prior to that time the general agent of the Whittenton Mills represented to third persons, with whom the firm of William Mason & Company were dealing, that the corporation was a member of the partnership. The nature of the business in which Wm. Mason & Co. were engaged, and the manner of conducting it, were throughout known to all the officers of the corporation; and to all the stockholders except one, who was the owner of four shares from the time of the organization until 1854, when he transferred them to one of the other stockholders.

¹ Statement abridged. Portions of arguments omitted. — Ed.

S. Bartlett, and *B. R. Curtis*, for the petitioners. 1. A manufacturing corporation, created by a law of this State to carry on business therein, pursuant to the Rev. Sts. cc. 38, 44, cannot enter into a general copartnership with either a natural person or another corporation, even for the prosecution of the same business for which it was chartered. The powers of a corporation are only those expressly granted, and those implied, because needful, or, perhaps, usual and customary, for the ends which the corporation was created to attain. *Salem Milldam v. Ropes*, 6 Pick. 32. *Beatty v. Knowles*, 4 Pet. 166. *Angell & Ames on Corp.* §§ 229, 239, 256. The power to form a general copartnership is neither expressly granted, nor needful to transact the business of manufacturing.

The entire legislation of the State for the regulation of manufacturing corporations proceeds upon the assumption that each corporation will conduct its own several affairs separately, by means of its own duly appointed officers and agents, acting in the name and behalf of the corporation; and its interests and affairs cannot be committed to a partnership, and conducted under the rules and principles which govern partnership business and liability, without violating the public policy of the State, exhibited by its legislation, and removing the safeguards erected for the security of those who may become creditors of the corporation. Rev. Sts. c. 38, §§ 1, 2, 22, 25. In a partnership, the individual partner, (in this case Mason,) might do anything, within the scope of the business, not only without the concurrence of the directors, but against their will.

[Remainder of argument omitted.]

E. R. Hoar, and *H. Gray, Jr.*, for the assignees. 1. A corporation has the same power as a natural person to make all contracts not prohibited by law, and which are necessary or usual in transacting the business which it is authorized by law to transact. The power to make a contract of partnership is not a distinct corporate power, to be created or conferred only by a special grant; but, like the appointment of an agent—and each partner is, as between themselves, an agent of the other—is only one mode or instrumentality of effecting the lawful objects for which the corporate powers were given. A corporation therefore may form a contract of copartnership to effect any purpose which it may lawfully accomplish by other means, agencies, or instrumentalities. *Angell & Ames on Corp.* §§ 95, 96, 271, 272. *Canal Bridge v. Gordon*, 1 Pick. 304, 307. *Peckham v. North Parish in Haverhill*, 16 Pick. 287. *Old Colony Railroad v. Evans*, 6 Gray, 38, 39. *Catskill Bank v. Gray*, 14 Barb. 479. *Catskill Bank v. Hooper*, 5 Gray, 584, 585. *Conkling v. Washington University*, 2 Maryland Ch. 508. *Shrewsbury & Birmingham Railway v. London & Northwestern Railway*, 17 Ad. & El. N. R. 663, 665, 2 Macn. & Gord. 353, and 6 H. L. Cas. 135. *Great Northern Railway v. South Yorkshire Railway & River Dun Co.* 9 Exch. 642.

This case falls within the principle upon which congress has been

held to have the power to incorporate a bank, although no such power is expressly granted, and the Constitution declares that all powers not delegated are reserved. 1 Kent Com. (6th ed.) 249-254.

The Whittenton Mills are shown to have made and acted under agreements of copartnership with William Mason. "Trading corporations are affected, like private persons, with obligations arising from implications of law, and from equitable duties which imply obligations; with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents; and generally, by those legal and equitable considerations, which affect the rights of natural persons." *Melledge v. Boston Iron Co.* 5 Cush. 175.

[Remainder of argument omitted.]

THOMAS, J. This is a petition to this court, sitting in equity, and as such having, by the *St.* of 1838, c. 163, the jurisdiction and the supervision of all proceedings in insolvency. The averments of the petition are admitted by the answers of the respondents. Nor is there a question upon the facts agreed that a copartnership was entered into by the Whittenton Mills and the said Mason, and for the purposes stated, if the corporation was capable in law of entering into and forming such partnership and for such ends.

But the petitioners say, first, that the Whittenton Mills could not enter into any legal partnership; secondly, that if it were so capable, it could not form a copartnership for the prosecution of a business foreign to the purpose for which alone it was created; thirdly, that if such legal partnership existed, the petitioners were not liable to be declared insolvent upon the petition of Mason and under the *St.* of 1838, c. 163, and the acts in addition thereto; such acts respecting only natural persons and making no provision for bodies corporate.

At the threshold of the cause and of its elaborate discussion is the question, Was this corporation capable of forming a partnership, of entering into the contract? This question presents itself in two forms. The more general one is: Has a corporation, as one of its usual inherent powers, the capacity to form a contract of copartnership? The narrower question, but for this case the practical and pertinent one, is, Can a manufacturing corporation in this commonwealth, incorporated since February, 1831, and subject to the provisions of the thirty-eighth and forty-fourth chapters of the revised statutes, enter into a contract or society of copartnership?

This corporation was created in March, 1836, as a manufacturing corporation, for the purpose of manufacturing cotton goods in the town of Taunton, and for that purpose was invested with all the powers and privileges, and made subject to all the duties, restrictions, and liabilities set forth in the thirty-eighth and forty-fourth chapters of the revised statutes, passed on the fourth of November preceding, but not to take effect till the first of May, eighteen hundred and thirty-six. *St.* 1836, c. 19. This charter, with the provisions of the chapters referred to

and made part of it, is the origin and source of the powers and functions of the corporation. What powers are granted expressly, or by implication, because necessary or usual for the purposes which this charter was given to effect, the corporation has, and no more.

There is one obvious and important distinction between such a society as this charter creates and that of a partnership. An act of the corporation, done either by direct vote or by agents authorized for the purpose, is the manifestation of the collected will of the society. No member of the corporation, as such, can bind the society. In a partnership each member binds the society as a principal. If then this corporation may enter into partnership with an individual, there would be two principals, the legal person and the natural person, each having, within the scope of the society's business, full authority to manage its concerns, including even the disposition of its property.

The second section of c. 38 of the Rev. Sts. provides that the business of every such manufacturing corporation shall be managed and conducted by the president and directors thereof, and such other officers, agents, and factors as the company shall think proper to authorize for that purpose. It is plain that the provisions of this section cannot be carried into effect where a partnership exists. The partner may manage and conduct the business of the corporation, and bind it by his acts. In so doing he does not act as an officer or agent of the corporation by authority received from it, but as a principal in a society in which all are equals, and each capable of binding the society by the act of its individual will.

Indeed, in examining this chapter, it will be found that there is scarcely a provision for the conduct of the business of a manufacturing corporation that is not inconsistent with the existence of a contract by which the power to manage the business of the company and to bind the corporation by his acts is vested in one not a member of the corporation nor its officer or agent. Such are the third, fourth, and fifth sections, providing how the president and directors, and other officers, agents, and factors of the corporation shall be chosen. Such too is the sixth section, which authorizes every such company to make by-laws for its own regulation and government. Such are the several provisions authorizing the stockholders to fix the amount of the capital stock, to increase the same within the limit fixed by law, or to reduce it. §§ 9, 11, 19. And such is the provision requiring the president and directors to give annual notice of the amount of the debts of the corporation; the means of stating which would not be in their power if another principal had the power of creating the debts. § 22. Of the same character is the twenty-fifth section, by which it is declared that the whole amount of the debts which the corporation shall at any time owe shall not exceed the amount of the capital stock actually paid in, and which renders the directors, under whose administration an excess shall occur, liable personally to the extent of such excess; a provision evidently based upon the ground that the exclusive power to contract

debts is vested in such directors, and that they cannot be divested of it, and which is wholly inconsistent with the existence of a power in the corporation to enter into a contract of partnership, by which another principal would be created, having equal power to contract debts and to bind the partnership and the corporation *in solido*.

Indeed the effect of all our statutes, the settled policy of our legislature, for the regulation of manufacturing corporations is that the corporation is to manage its affairs separately and exclusively; certain powers to be exercised by the stockholders, and others by officers who are the servants of the corporation and act in its name and behalf. And the formation of a contract, or the entering into a relation, by which the corporation or the officers of its appointment should be divested of that power, or by which its franchises should be vested in a partner with equal power to direct and control its business, is entirely inconsistent with that policy.

The power to form a partnership is not only not among the powers granted expressly or by reasonable implication, but is wholly inconsistent with the scope and tenor of the powers expressly conferred, and the duties expressly imposed, upon a manufacturing corporation under the legislation of the Commonwealth.

The difficulties would be obviously greater in holding such a partnership to be valid, when formed and carried on for the prosecution of a business other than that, if not foreign from that, for which the corporation was created. It is difficult to see how the corporation should engage in such business, even when under its own control, still less to enter into copartnership with third persons for that purpose.

By the *St.* of 1852, c. 195, not adverted to in the argument, corporations created for the manufacture of woollen and cotton goods are authorized to carry on certain other manufactures, but this only when four fifths of the stockholders shall, by vote at a special meeting called for the purpose, consent to the same. This statute furnishes a pretty strong implication that the power to carry on a different business from that for which the corporation was chartered, did not exist before the statute was passed.

We are therefore all of opinion that in the formation of the alleged partnership the corporation exceeded the powers given by its charter expressly or by implication, and that the contract of copartnership was illegal and void.

It is said however by the respondents that if this be so, such violation of the charter can only be alleged by the Commonwealth upon proceedings for a forfeiture of the charter, and that the validity of the partnership cannot be called in question by the corporation or by its creditors or debtors.

As the basis of proceeding against the Whittenton Mills in insolvency upon the petition of Mason under the *St.* of 1838, c. 163, § 21, even supposing that the provisions of that statute are not limited to natural persons, it was necessary to show the existence of an actual

copartnership between Mason and the corporation. It was not sufficient to show that they had so conducted as to be liable to third persons as partners; they must be partners *inter sese*. *Hanson v. Paige*, 3 Gray, 239. There must be a contract of copartnership between them. Into such a contract the petitioners were incapable of entering.

But the case rests upon broader grounds. The charter of the corporation is part of the public law. Rev. Sts. c. 2, § 3. Those who deal with the corporation must take notice of the extent of its powers, and that the corporation is legally incapable of entering into the contract of partnership; that that contract was beyond the scope of its authority, and that this incapacity resulted from considerations not personal or peculiar to this corporation or its members, but from general grounds of public policy, which the corporation and those dealing with it cannot be permitted to contravene and defeat. That policy is to confine these corporations within the limits prescribed by law, to protect the stockholders from liabilities which the charter and laws do not create; and, while it imposes upon the stockholders of the corporation heavy responsibilities, to retain to them the legal control of its business and conduct of its affairs.

The precise point at issue before us is the validity of these proceedings in insolvency. That depends, as before remarked, upon the existence of the partnership between the Whittenton Mills and Mason. Upon that only could the petition of Mason be sustained.

It is not necessary for this purpose to decide how far these considerations will affect those claiming to be the creditors or debtors of the alleged partnership. It is in this point of view only, that the cases of *Chester Glass Co. v. Dewey*, 16 Mass. 94, *Quincy Canal v. Newcomb*, 7 Met. 276, and *White v. South Shore Railroad*, 6 Cush. 412, can be deemed material. They have the tendency to show the existence of a contract between the Whittenton Mills and Mason, which the former is estopped to question.

In the case of *Chester Glass Co. v. Dewey*, one ground of defence to the recovery for goods sold and delivered by the plaintiff corporation was, that the corporation was prohibited from trading. The court held, that the legislature did not intend to prohibit the supply of goods to those employed in the manufactory. That certainly was the end of the matter. The court however added, that the defendant could not refuse payment on this ground, but that the legislature may enforce the prohibition by causing the charter to be revoked. This suggestion will be entitled to consideration if a question should arise as to the right of the alleged company to recover for goods sold, but it certainly is not conclusive upon the relation of the partners *inter sese*.

In *Quincy Canal v. Newcomb*, it was held, that, where a canal was opened and toll claimed and the defendant used the canal, he was liable to the payment of such toll and could not avoid such payment by showing that the canal had not been made so deep as the statute required.

In *White v. South Shore Railroad*, it was held, that the defendants

were liable for damages in constructing their road through and across a mill pond authorized by the general court to be raised in a navigable river, though in erecting the dam for raising the pond the condition of the act permitting it had not been complied with. The court said, that the railroad company could not take the petitioners' pond from them because the dam was not constructed in compliance with the act; that whether it had been so constructed was a matter between the government and the petitioner.

If the assent of all the stockholders were shown to the formation of the partnership — which is not the fact — it could not enlarge the powers of the corporation, or make that legal which was inconsistent with the law limiting their powers and prescribing their duties. Whether, if such assent were available, it could be manifested in any other mode but a vote of the stockholders, it is not necessary to inquire.

The decision of the question as to the existence of the partnership between the Whittenton Mills and William Mason in the negative renders unnecessary the inquiry whether, if a partnership had existed, the petitioners could be subjected to the provision of the insolvent law of 1838, c. 163, and the acts in addition thereto.

The proceedings in insolvency founded upon the petition of Mason as the partner of said Whittenton Mills under the firm of William Mason & Company were illegal and must be vacated and set aside, so far as they affect the estate of the Whittenton Mills. A mandamus must issue to the judge in insolvency for the county of Bristol to proceed upon the petition of the Whittenton Mills, to hear the parties, and, good cause being shown, to issue his warrant thereon.

Decree accordingly.

BATES v. CORONADO BEACH CO.

1895. 109 *California*, 160.¹

APPEAL by the Coronado Beach Company from a judgment of the Superior Court of San Diego County.

The plaintiff brought this action against the defendant for an accounting upon a partnership agreement between them for the purchase and disposition of certain real estate.

The facts as found by the Court were substantially as follows:

The plaintiff and the appellant entered into a contract by which it was agreed that they should purchase certain lands and other property from the Millers, sell the same, pay certain debts and encumbrances

¹ Statement compiled from opinion in this case and from opinion in previous report of same case under the name of *Bates v. Babcock*, 95 *Calif.* 479. Only so much of the opinion is given as relates to a single point. — Ed.

thereon, and divide the profits and losses arising therefrom equally between them. Both of the parties to the agreement immediately entered upon its performance, and carried it out according to its terms. The plaintiff gave to the defendant the fifteen thousand dollars which was his contribution to the venture, and transferred the title to the land then held by him [as trustee for the Millers] to the person designated by the defendant [one Hubbell, secretary of the Coronado Beach Company], and the defendant disposed of the money in discharging obligations upon the land, and afterward disposed of the land. One purpose for which the Coronado Beach Company was incorporated was the selling or otherwise disposing of lands.

In the Superior Court judgment was rendered against the Coronado Beach Company.

Gibson & Titus, for appellant.

Clarence L. Barber, and *J. W. Hughes*, for respondent.

HARRISON, J.

It was not *ultra vires* for the appellant to enter into the agreement with the plaintiff. The power of a corporation to enter into a general partnership with an individual, or with another corporation, is not here involved. The ground upon which this power is sometimes denied is that a partnership implies the power of each partner, under his authority as a general agent for all the purposes of the partnership, to bind the others by his individual acts, whereas the statutes under which a corporation exists require its powers to be exercised by a board of directors, and preclude it from becoming bound by the act of the one who may be only its partner. There is, however, in the present case no question of agency in the management of the affairs of the corporation. The plaintiff paid the money to the appellant, and transferred to its appointee the title to the land, so that the entire management of the business contemplated by the contract was intrusted to the corporation itself. There is no rule of law that will preclude a corporation from entering into a contract with an individual, which will have the effect to carry out directly or indirectly the object of its incorporation, and to provide in that agreement that the gains or losses of the venture shall be borne equally by both parties. Section 354 of the Civil Code provides: "Every corporation, as such, has the power: . . . 8. To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation."

[Remainder of opinion omitted.]

Judgment and order affirmed

GAROUTTE, J., and VAN FLEET, J., concurred.

Hearing in Bank denied.

BEATTY, C. J., dissented from the order denying a hearing in Bank.

BOYD v. AMER. CARBON BLACK CO.

1897. 182 Pa. State, 206.¹

BILL in equity by Boyd against the defendant corporation ; alleging (among other facts) that a partnership was entered into and carried on for a time between plaintiff and defendant ; praying (*inter alia*) that an account be taken of all the rents, royalties, and profits properly due plaintiff ; that the partnership be dissolved, and an account be taken ; that a receiver be appointed to take charge of the partnership property, books, and business ; and that the defendant be decreed to pay whatever balance was found due.

Defendant demurred, on the ground : that no such partnership as averred by plaintiff could be lawfully entered into by a corporation ; therefore equity would not take jurisdiction, either to decree dissolution, an account, or the appointment of a receiver.

The court below sustained the demurrer and dismissed the bill. Plaintiff appealed.

Eugene Mullin, for appellant.

George A. Berry, for appellee.

DEAN, J.

Of course, the demurrer admits the truth of the averments in plaintiff's bill. We have, then, the facts that the contracts of partnership were made by the plaintiff with the corporation of which he was a stockholder and director and a gross violation by defendants, not only of the contract of partnership, but of the contracts made with him for the purchase of gas from his premises by the partnership. The principal reason given by the learned judge of the court below for sustaining the demurrer is that the contract of partnership by the corporation was ultra vires ; that no corporation has authority to share its corporate management with natural persons, in a partnership. And for this ample authority is cited, and the rule cannot be questioned. But, conceding the full force of this rule, does it deprive the plaintiff, on the facts, of all remedy in equity ? Assume that the partnership has not now and never had a legal existence ; that is only because one of the partners had no power to enter into it ; but, while it had no legal existence, it had one in fact ; and the other partner fully performed ; the corporation had the full benefit of the contract up to the time it concluded that it was more profitable to violate its agreements. Beach on Corporations, sec. 842, says : " It may be considered prima facie ultra vires for an incorporated company to enter into a partnership with other persons ; " but, all the authorities hold

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

that, notwithstanding the prima facies, if it be shown that the other partner had fully performed his obligations under the contract, this plea will not avail. "A corporation may not avail itself of the defence ultra vires when the contract has been in good faith fully performed by the other party, and it has had the full benefit of the performance and of the contract:" 27 Am. & Eng. Ency. of Law, 363; Morawetz on Corporations, sec. 689; *Wright v. Pipe Line Co.*, 101 Pa. 204; *R. R. Co. v. Transportation Co.*, 83 Pa. 160.

Taking, as we must, every material averment of plaintiff's bill as an admitted fact, the defence, if it should prevail, would work a palpable injustice. While public policy demands that the courts should declare such contracts by corporations unlawful, and that they will make no decree which prolongs their life, in fact, for a single day, every principle of equity commands that the corporation receiving a benefit from such contract shall account for what it has received from him who has fully performed. The contract is not malum in se, but only malum prohibitum; it was illegal, but not iniquitous. If the corporation has had the benefit of \$15,000 paid by Boyd for the construction of the second plant, has received the proceeds of the manufactured product, has used and continues to use his gas, it ought to and must account. It is wholly immaterial whether the partnership be declared dissolved because it is illegal to carry it on, or it be declared at an end in fact, because of want of power on part of the corporation to enter it; in either case the plaintiff is entitled to his property in possession of the defendants, and whatever money they have received more than their share. As they allege that the contracts with plaintiff were illegal they can claim no rights of possession of the whole partnership assets and plaintiff's property under them, and must deliver them up to be cancelled.

It is, therefore, directed that the decree of the court below sustaining the demurrer and dismissing the bill be reversed, and that plaintiff's bill be reinstated and taken pro confesso. Further: that the partnership, which was in fact entered into and carried on between plaintiff and defendants, under the three several agreements marked exhibits A, B, and C, be declared at an end, and that said contracts be surrendered by defendants for cancellation; that an account be taken of all the rents, royalties, income, and profits due plaintiff from said defendants, according to said contracts; that all the business of said partnership in fact be wound up, and all the assets of the same be turned into cash, and an account be then stated between the parties, and distribution of the cash be made as in and by the said contracts the parties have a right to demand, and that proper decrees for enforcing payment according to said distribution be made on the parties by the court below. It is further directed that under the equity rules a receiver be appointed by the court below, to take into his possession the in fact partnership property, books, and accounts, to the end that

a settlement may be had of its business; and that such further and other decree or decrees be entered by the court below as will promote equity between the parties, in accordance with this opinion.

It is further ordered that the appellee pay the costs of this appeal.

SABINE TRAM CO. v. BANCROFT *et als.*

1897. 16 *Texas Civil Appeals*, 170.¹

SUIT, by a corporation, to recover damages incurred by reason of the breach of a contract entered into between it and the defendants, whereby the parties agreed to associate themselves as copartners in the business of manufacturing and selling pine lumber. The corporation agreed to furnish sufficient pine logs to operate and run the sawmill of the defendants, who agreed to furnish for the partnership the use of their steam sawmill for the purpose of sawing the pine logs into lumber. There were also stipulations as to the mode of paying the corporation for logs furnished by it; as to the purchase of logs by the partnership from outside parties; and as to an annual division of partnership profits. By the agreement the partnership was to continue for three years from Jan. 8, 1893. Plaintiff alleged that, on Nov. 1, 1893, the defendants refused to operate the mill or to receive any logs which the plaintiff could have furnished; and that, on Dec 23, 1893, the defendants withdrew from the contract. The damages sought to be recovered are the profits that would have accrued to the plaintiff by the sale of the logs from Nov. 1, 1893, until the time fixed for the termination of the contract.

In the court below a general demurrer to the plaintiff's petition was sustained. Plaintiff appealed.

Greer & Greer, and O'Brien, Bordages & O'Brien, for appellant.

Ford, Martin & Jones, for appellees.

FLY, J. The contract is undoubtedly one of partnership, and the question is presented, can a corporation created under the laws of Texas enter into a partnership with individuals?

We conclude that the partnership formed between appellant and appellees was unauthorized by the statute, and contrary to public policy, and, while those parts of the contract which have been executed should be enforced between the parties, no enforcement of the unexecuted part of it can be properly demanded. *Parish v. Wheeler*, 22 N. Y. 494; *Thomas v. Railroad Co.*, above cited. The suit, in this case, does not relate to any matters that arose between the parties before the dissolution of the illegal partnership, but the cause of action is the probable profits that would have accrued to appellant had the

¹ Statement abridged. Arguments and part of opinion omitted. — *Ep.*

partnership been continued. The suit is to recover damages for non-performance of a contract unauthorized by law and obnoxious to public policy. The damages claimed arose from a failure to further prosecute an illegal enterprise. The law does not wield its power to prevent persons or corporations from withdrawing from illegal combinations, but rather encourages repentance and reform, even though at a late hour. When the illegal contract has ended by the acts of either party to it, future consequences resulting from the infraction will not subject the party to a suit for damages, but the parties will only be held responsible for those parts of the contract already executed. "The test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires the aid of the illegal transaction to establish his case." *Swan v. Scott*, 11 Serg. & R. (Pa.) 155, cited by *Thomp. Corp.* § 6024. Applying this test to appellant's case, it must necessarily fall through, because it is based entirely upon the illegal contract of partnership.

The proposition is urged that, although the contract of partnership may have been invalid, still that part of it in regard to the delivery of the logs by appellant was legal, and should be enforced. The proposition cannot be entertained. The delivery of the logs grew out of it, and is inseparably bound to the invalid contract of partnership, and the whole contract was vitiated by the illegality of the partnership. Courts will not analyze a vicious and illegal contract, which as a whole is void, and enforce a part, which, independent of its vicious company and surroundings, would be legal and valid, but will decline to enforce any part of it. It would be unconscionable to validate the part of the contract relating to the logs, when there would have been no such contract without the partnership element entering into it. A different case might be presented if the suit were for logs furnished before the breach of the contract. The judgment is affirmed. Writ of error refused.

Affirmed.

PEOPLE v. NORTH RIVER SUGAR REFINING CO.

1890. 121 *New York*, 582.¹

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 7, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the trial court, and affirmed an order denying a motion for a new trial.

This action was brought by the attorney-general to have the defendant "dissolved, its charter vacated and its corporate existence annulled."

The complaint alleged, and it was found, that defendant is a corporation organized under the General Manufacturing Act; that it, together with other corporations engaged in the business of sugar refining, in violation of law and in abuse of its powers, became a party to and carried out a certain agreement. Some of the material features of this agreement are, in substance, as follows:

All the shares of the capital stock of all the corporations shall be transferred to a board consisting of eleven persons.

In lieu of the capital stock of each corporation, certificates not exceeding \$50,000,000 shall be issued by the board, and allotted in certain proportions to the respective corporations. 15 per cent of the certificates thus allotted to each corporation shall be left with the board; the remaining 85 per cent shall be divided among the former stockholders in proportion to the amount of stock formerly owned by each.

The board of eleven persons, holding all the stock of all the corporations, may transfer shares to persons whom it may desire should be constituted directors of such corporations.

The several corporations shall maintain their separate organizations, and each shall carry on and conduct its own business.

The profits arising from the business of each corporation shall be paid over by it to the board hereby created, and the aggregate of said profits, or such amount as may be designated for dividends, shall be proportionately distributed by said board, at such times as it may determine, to the holders of the certificates issued by said board for capital stock.

No action shall be taken by the board which shall create liability by it or by its members.

The certificates retained by the board (15 per cent of the entire issue) shall be subject to be disposed of by the board either for the acquisition of other refineries to become parties to this agreement, payment for additional capacity, or by appropriations to the several refineries.

The funds necessary to enable the board to make the payments herein provided to be made by it may be raised by mortgage to be made by

¹ Statement abridged. Arguments and portions of opinion omitted. — **ED.**

the corporations, or either, any, or all of them, on their property, and by such other means as shall be satisfactory to such board.

Vacancies in the board by expiration of office shall be filled at an annual meeting of the holders of certificates, at which said holders shall vote according to the number of shares for which they hold certificates.

Other facts material to the decision are stated in the opinion.

James C. Carter, and *John E. Parsons*, for appellant.

Charles F. Tabor, Attorney General, and *Roger A. Pryor*, for respondent.

FINCH, J. The judgment sought against the defendant is one of corporate death. The State, which created, asks us to destroy; and the penalty invoked represents the extreme rigor of the law. Its infliction must rest upon grave cause, and be warranted by material misconduct. The life of a corporation is indeed less than that of the humblest citizen, and yet it envelops great accumulations of property, moves and carries in large volume the business and enterprise of the people, and may not be destroyed without clear and abundant reason. That would be true even if the legislature should debate the destruction of the corporate life by a repeal of the corporate charter; but is beyond dispute where the State summons the offender before its judicial tribunals, and submits its complaint to their judgment and review. By that process it assumes the burden of establishing the charges which it has made, and must show us warrant in the facts for the relief which it seeks.

Two questions, therefore, open before us: first, has the defendant corporation exceeded or abused its powers, and, second, does that excess or abuse threaten or harm the public welfare.

The first question requires us to ascertain what the defendant corporation has done in violation of its duty, or omitted to do in performance of its duty. We find disclosed by the proof that it has become an integral part and constituent element of a combination which possesses over it an absolute control, which has absorbed most of its corporate functions, and dictates the extent and manner and terms of its entire business activity. Into that combination, which drew into its control sixteen other corporations engaged in the refining of sugar, the defendant has gone, in some manner and by some process, for as an unquestionable truth we find it there. All its stock has been transferred to the central association of eleven individuals denominated a "Board;" in exchange it has taken and distributed to its own stockholders certificates of the board carrying a proportionate interest in what it describes as its capital stock; the new directors of the defendant corporation have been chosen by the board, made eligible by its gift of single shares, and liable to removal under the terms of their appointment at any moment of independent action. It has lost the power to make a dividend, and is compelled to pay over its net earnings to the master whose servant it has become. Under the orders of that master it has ceased to refine sugar, and by so much, has lessened the supply upon the

market. It cannot stir unless the master approves, and yet is entitled to receive from the earnings of the other refineries, massed as profits in the treasury of the board, its proportionate share for division among its own stockholders holding the substituted certificates. In return for this advantage it has become liable to be mortgaged, not for its own corporate benefit alone, but to supply with funds the controlling board when reaching out for other and coveted refineries. No one can look these facts fairly in the face without being compelled to say that the defendant is in the combination and in to stay. Indeed, so much is with great frankness admitted on the part of the appellant. Its counsel concedes that the stock was transferred "to the board mentioned in the agreement and on the terms and for the purposes mentioned in the agreement; and that this action effectually lodged the control of the defendant company, so far as such control can be secured by the voting power, in that board."

But that truth does not alone solve the problem presented. We are yet to ascertain whether the corporation became the subordinate and servant of the board by its own voluntary action, or the will and power of others than itself; by force of a contract to which it was in reality a party, or as the simple consequence of a change of owners; by its fault or its misfortune; by a sale or by a trust. For, if it has done nothing, if what has happened, and all that has happened, is ascertained to be that the stockholders of the defendant, one or many, sold absolutely to the eleven men who constituted the board their entire stock, and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way as any absolute owners may; if that is the truth, and the entire and exact truth, it is difficult to see wherein the corporation has sinned, or what it has done beyond merely omitting for a time to carry on its business. That is the theory upon which the appellant stands, and which it submits to our examination.

On the other hand it is contended that there never was a sale, but a trust constituted by mutual agreement; that they who agreed were the whole body of stockholders in each corporation necessarily representing and binding the corporation itself; that they transferred their shares to the board upon the trusts declared in the deed; that the certificates issued by the board were the formal declaration of the trust; that the corporate stockholders parted with the legal title of their stock to the chosen trustees with the power to vote upon it, but retained, nevertheless, its beneficial ownership through the operation of the certificates; and so the corporations entered into a partnership with each other vesting the partnership power in a board of control.

I have brought these two theories face to face where they may confront each other, because, when a choice is made between them, we have gone a long distance towards the end of the controversy.

[The learned Judge *held*, that the transaction was not a sale, but a trust constituted by mutual agreement.]

The combination, therefore, framed by the deed was a trust, and, if created by the corporations, or in any respect the consequence or product of their action, some inevitable results would be certain to follow. But here we encounter the stronghold of the appellant's argument which is, that if the corporations are in some manner in the combination, they are there solely as the result of a contract other than their own; are there without corporate action on their part; and so are sufferers and not sinners. The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators; as it were, to separate in our thought the soul from the body, and admitting the sins of the latter to adjudge that the former remains pure. Let us first recall the facts in the order of their occurrence.

[The learned Judge here recapitulated the facts; which were, in substance, that the stockholders unanimously directed the secretary to sign the agreement in behalf of the corporation; that he accordingly did so sign; that a subsequent vote to revoke this action was ineffective; that, at a later date, the stockholders voted to sell all the stock to John E. Searles, Jr., for \$325,000; that the stock was so conveyed to Searles; and that Searles thereafter conveyed all the stock to the board of eleven persons receiving therefor certificates for \$700,000, deducting the 15 per cent retained by the board. The opinion then proceeds:]

What Searles did with the certificates, we do not know, nor is it important to ascertain. We do know that new directors were chosen by the vote of the board; that Searles became President of the corporation; that its share of the regular dividend has been allotted to it for its certificate holders, and that it has wholly ceased to refine sugar. And thus its baptism in the pool of the board became complete and final.

And yet it is argued that the corporation, the legal entity, has done nothing; that Searles was guilty, but the corporate robe that enveloped him was innocent, and so he must be left to wear it undisturbed; that while all that was human and could act had sinned, yet the impalpable entity had not acted at all and must go free. I believe that the history of what occurred, as I have already described it, furnishes a sufficient answer, assuming that stockholders and trustees acting together can do a corporate act at all. There *was* corporate action in making the combination agreement which bound the defendant. The revocation of an executed authority left the contract standing. The corporation thus helped to make the trust and became an element of it. If there was anything imperfect in its action, the new stockholder and his associates waived the imperfection by acting upon the agreement of the corporation, and so confirming it in all particulars.

But the assumption underlying the view I have expressed is itself contested, and a proposition asserted which denies the possibility of any corporate action, except by the trustees or directors acting formally as such; a proposition which, if sound, dominates the whole field

of controversy, and, establishing that there has been no corporate action at all, effectually shuts out every question of illegality or public injury. I cannot admit that proposition. I think there may be actual corporate conduct which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and if illegal and injurious may deserve and receive the penalty of dissolution. There always is, and there always must be, corporate conduct without formal corporate action where the thing challenged is an omission to act at all. A corporation organized in the public interest, with a view to the public welfare, and in the expectation of benefit to the community, which is the motive of the State's grant, may accept the franchise and hold it in sullen silence, doing nothing, resolving nothing, furnishing no formal corporate action upon which the State can put its finger and say, this the corporation has done by the agency through which it is authorized to act. That is corporate conduct which the State may question and punish without searching for a formal corporate act. The directors of a corporation, its authorized and active agency, may see the stockholders perverting its normal purposes by handing it over, bound and helpless, to an irresponsible and foreign authority, and omit all action which they ought to take, offer no resistance, make no protest, but silently acquiesce as directors in the wrong which as stockholders they have themselves helped to commit. That again is corporate conduct, though there be an utter absence of directors' resolutions. Is it asked what they could have done to prevent the organization of the trust; how they were negligent and unfaithful as corporate officers by their omission to act; what good a mere protest or objection would have accomplished; what effective form their resistance could have assumed? The answer is that they could have refused to recognize the illegal trust transfer of the stock; they could have declined to register the new ownership upon their stock-books; they could have said, and acted upon their words, that the original stockholders remained not only the beneficial, but the legal owners of the stock; and, if the board trustees appealed to the law, the resisting directors could challenge the legality of the transfer as moulded by the combination agreement, and might have defeated the trust and shattered it at the outset of its career. So much they could have done as corporate officers; so much it was their duty to have done as representatives of the corporation; and when, beyond that corporate neglect, they recognized the validity of the stock transfers in trust, put the new and unlawful ownership upon their books, and accepted its votes in the choice of new directors who were to throttle the independence of the corporation and chain it to the will of the trust, I think we must shut our eyes in wilful blindness if we fail to see both corporate neglect and corporate action.

It is true, as we are reminded, that the statute confers upon trustees

and directors general authority to manage the stock, property, and concerns of manufacturing corporations; and equally true that, as a general rule and as between the companies and those with whom they deal, the corporate action must be manifested through and by the directors; but other statutes indicate with equal plainness that there are corporate acts which the trustees cannot perform, and which affect and bind the corporation only upon the condition that they proceed from the stockholders, or from them and the trustees acting together. In increasing or diminishing the capital stock, the corporate act is wholly that of the corporators, and in consolidating two or more companies into one, there must be the joint action of both trustees and stockholders. The trust of the refineries, in substance and effect, approached very near to these two corporate acts, so far as the resultant consequences affected the corporators acting. The trust stipulations practically doubled their corporate stock through the agency of the certificates issued, and the combination in its result is largely the equivalent of a substantial consolidation. If these things had been done lawfully, they would have been accomplished by the united action of trustees and corporators, and beyond any question would have been corporate acts. Having been done unlawfully, but by the same united agency aiming at similar results, they must still constitute corporate conduct, unless the bare fact of their illegality takes away their corporate character. To say that, would disarm the State in every case of misuse or abuse of chartered powers.

The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what in a given case has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise usually is material, but as between it and the State, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The State gave the franchise, the charter, not to the impalpable, intangible, and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hand, and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act, collectively, as an aggregate body, without the least exception, and so acting, reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the State may review, and not be defeated by the assumed innocence of a convenient fiction. As was said in

People ex rel. v. K. & M. T. R. Co. (23 Wend. 193), "though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court."

It remains to determine whether the conduct of the defendant in participating in the creation of the trust, and becoming an element of it, was illegal and tended to the public injury, and we may consider the two questions together and without formal separation.

It is quite clear that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the State the gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control. When it had passed into the hands of the trust, only a shell of a corporation was left standing, as a seeming obedience to the law, but with its internal structure destroyed or removed. Its stockholders, retaining their beneficial interest, have separated from it their voting power, and so parted with the control which the charter gave them and the State required them to exercise. It has a board of directors nominally and formally in office, but qualified by shares which they do not own, and owing their official life to the board which can end their power at any moment of disobedience. It can make no dividends whatever may be its net earnings, and must encumber its property at the command of its master, and for purposes wholly foreign to its own corporate interests and duties. At the command of that master it has ceased to refine sugar, and without any doubt for the purpose of so far lessening the market supply as to prevent what is termed "over production." In all these respects it has wasted and perverted the privileges conferred by the charter, abused its powers, and proved unfaithful to its duties. But graver still is the illegal action substituted for the conduct which the State had a right to expect and require. It has helped to create an anomalous trust which is in substance and effect, a partnership of twenty separate corporations. The State permits in many ways an aggregation of capital, but mindful of the possible dangers to the people, over-balancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision, where such aggregation depends upon its permission and grows out of its corporate grants. It is a violation of law for corporations to enter into a partnership. (*N. Y. & S. C. Co. v. F. Bank*, 7 Wend. 412; *Clearwater v. Meredith*, 1 Wall. 29; *Whittenton Mills v. Upton*, 10 Gray, 596.) The case last cited furnishes the reasons with precision and at length. It shows the utter inconsistency of a double allegiance by those who act for the corporation to two different principals, and demonstrates that the vital characteristics of the corporation are of necessity drowned in the paramount authority of the partnership. That the combination of the refineries partakes of the nature of a partnership is not denied.

Indeed, in one of the papers added to the appellant's brief, it is not only admitted but asserted and defended. That paper shows quite clearly, that by force of the arrangement, there was a community of interest in the fund created by the corporate earnings before division, and that each member of the trust shared in the profit and loss of all. It is said, however, that a consolidation of manufacturing corporations is permitted by the law, and that the trust or combination or partnership, however it may be described, amounts only to a practical consolidation which public policy does not forbid because the statute permits it. (Laws of 1867, chap. 960; Laws of 1884, chap. 367.) The refineries did not avail themselves of that statute. They chose to disregard it, and to reach its practical results without subjection to the prudential restraints with which the State accompanied its permission. If there had been a consolidation under the statute, one single corporation would have taken the place of the others dissolved. They would have disappeared utterly, and not, as under the trust, remained in apparent existence to threaten and menace other organizations and occupy the ground which otherwise would be left free. Under the statute the resultant combination would itself be a corporation deriving its existence from the State, owing duties and obligations to the State, and subject to the control and supervision of the State, and not, as here, an unincorporated board, a colossal and gigantic partnership, having no corporate functions and owing no corporate allegiance. Under the statute the consolidated company taking the place of the separate corporations could have as capital stock only an amount equal to the fair aggregate value of the rights and franchises of the companies absorbed; and not as here a capital stock double that value at the outset and capable of an elastic and irresponsible increase. The difference is very great and serves further to indicate the inherent illegality of the trust combination.

And here I think we gain a definite view of the injurious tendencies developed by its organization and operation, and of the public interests which are menaced by its action. As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions, and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest; and that to a much greater extent when beyond their own several aggregations of capital they compact them all into one combination which stands outside of the ward of the State, which dominates the range of an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion. It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the State to respect the rights of ownership and

protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine, and mass their forces in a solid trust or partnership, with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is opened to enormous combinations, vastly exceeding in number and in strength and in their power over industry any possibilities of individual ownership; and the State by the creation of the artificial persons constituting the elements of the combination, and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may bear is one thing, what it should cause and create is quite another.

And so we have reached our conclusion, and it appears to us to have been established, that the defendant corporation has violated its charter and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy. Our duty is to leave them until some proper emergency compels their consideration. Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this State there can be no partnerships of separate and independent corporations, whether directly, or indirectly through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints, but that manufacturing corporations must be and remain several as they were created, or one under the statute.

The judgment appealed from should be affirmed with costs.

All concur.

Judgment affirmed.

BAILEY, J., IN DISTILLING AND CATTLE FEEDING CO. v.
THE PEOPLE.

1895. 156 *Illinois*, 448, p. 486, pp. 490-492.¹

BAILEY, J. . . . There can be no doubt, we think, that the Distillers' and Cattle Feeders' Trust, which preceded the incorporation of the defendant, was an organization which contravened well-established principles of public policy, and that it was therefore illegal. No one who intelligently considers the scheme of this trust, as detailed in the information, can for a moment doubt that it was designed to be, and was in fact, a combination in restraint of trade, and that it was organized for the purpose of getting control of the manufacture and sale of all distillery products, so as to stifle competition, and to be able to dictate the amount to be manufactured and the prices at which the same should be sold, and thus to create, or tend to create, a virtual monopoly in the manufacture and sale of products of that character.

[After citing authorities.]

Many other decisions of similar import might be referred to, but the foregoing will suffice. They are sufficient, in our opinion, to establish the conclusion, in which the courts of the country, with very great unanimity, seem to concur, that trusts of the character of the one described in the information as existing prior to the organization of the defendant corporation are against the policy of the law, and are therefore illegal and void.

But the defendant contends that, while this may all be so, the change in organization from an unincorporated association to a corporation, and the change in the mode of holding the distillery properties of the various corporations formerly belonging to the trust, by surrendering the stock of the corporations, by means of which the control of those properties was formerly maintained, and having the properties themselves transferred and conveyed directly to the defendant corporation, have purged the combination of its illegality. It must be admitted that these changes, so far as they have any effect upon the rights or interests of the former stockholders in those corporations or of the public, are formal, rather than substantial. The same interests are controlled in substantially the same way and by the same agencies as before. The nine trustees of the trust, who, as the holders of all the capital stock of the corporations and as a majority of the directors of each, controlled such corporate property, became the subscribers for all the stock of the new corporation, and its board of directors. The

¹ This was a proceeding by *quo warranto* brought in the name of the People of the State of Illinois, by the Attorney-General, against a corporation organized under the general incorporation law of Illinois. In the court below judgment was rendered against the corporation, ousting it from its franchises. From that judgment the defendant corporation appealed.—ED.

conveyance and transfer of the properties of the constituent companies to the new corporation was merely a transfer by the trustees to themselves, though in a slightly different capacity, and the former stockholders in the constituent companies simply exchanged their trust certificates, share for share, for stock in the new corporation. That corporation thus succeeds to the trust, and its operations are to be carried on in the same way, for the same purposes, and by the same agencies, as before. The trust, then, being repugnant to public policy and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place. The control exercised over the distillery business of the country — over production and prices — and the virtual monopoly formerly held by the trust, are in no degree changed or relaxed, but the methods and purposes of the trust are perpetuated and carried out with the same persistence and vigor as before the organization of the corporation. There is no magic in a corporate organization which can purge the trust scheme of its illegality, and it remains as essentially opposed to the principles of sound public policy as when the trust was in existence. It was illegal before and is illegal still, and for the same reasons.

But it is urged that the defendant, by its charter, is authorized to purchase and own distillery property, and that there is no limit placed upon the amount of property which it may thus acquire. By its certificate of organization it is authorized to engage in a general distillery business in Illinois and elsewhere, and to own the property necessary for that purpose. It should be remembered that grants of powers in corporate charters are to be construed strictly, and that what is not clearly given is, by implication, denied. The defendant is authorized to own such property as is necessary for carrying on its distillery business, and no more. Its power to acquire and hold property is limited to that purpose, and it has no power, by its charter, to enter upon a scheme of getting into its hands and under its control all, or substantially all, the distillery plants and the distillery business of the country, for the purpose of controlling production and prices, of crushing out competition, and of establishing a virtual monopoly in that business. Such purposes are foreign to the powers granted by the charter. Acquisitions of property to such extent and for such purpose do not come within the authority to own the property necessary for the purpose of carrying on a general distillery business. In acquiring distillery properties in the manner and for the purposes shown by the information, the defendant has not only misused and abused the powers granted by its charter, but has usurped and exercised powers not conferred by, but which are wholly foreign to, that instrument. It has thus rendered itself liable to prosecution by the State by *quo warranto*, and we are of the opinion that, upon the facts shown by the information, the judgment of ouster is clearly warranted. It will accordingly be affirmed.

Judgment affirmed.

TRENTON POTTERIES CO. v. OLIPHANT.

1899. 58 *New Jersey Equity*, 507.¹

IN the Court of Errors and Appeals, on appeal from a decree advised by GREY, V. C., 56 *New Jersey Equity*, 680.

Bill in equity by Trenton Potteries Company, a New Jersey corporation, against Oliphant *et al.*; setting up the sale, by the defendants to the plaintiff, of the Delaware pottery and its good will and business; alleging that the defendants had covenanted not to engage in the business of manufacturing pottery ware except under certain specified circumstances; and further alleging that the defendants were manufacturing pottery ware in breach of their covenants. The bill prayed that the defendants might be enjoined from manufacturing pottery ware, save in the cases excepted from the covenants.

The case was heard before GREY, V. C., on bill, answer, and proofs.

The following facts appeared:

In the latter part of the year 1890, and in the month of January, 1891, there were engaged in the business of the manufacture of sanitary pottery ware (under which general designation were included sinks, urinals, water-closets and the like), eight different potteries, the Equitable, Enterprise, Crescent, Delaware, Empire, Willet's, Mad-dock's, and the Maryland. All except the Maryland were located in Trenton, New Jersey; the Maryland was at Baltimore. These eight potteries comprised all of the potteries in the United States which were then engaged in the production of sanitary ware (except a small concern at Wellsville, Ohio), and had formed an association called the American Sanitary Potters' Association, for the purpose of securing uniform action as to the prices of the ware which they manufactured and sold. The prices at which the goods produced by the associated concerns should be sold were fixed by a majority vote of the several members. Each pottery had its individual vote in the association, and the vote of the majority controlled, and all were by their agreement bound to sell only at the prices that the association should fix. The several potteries comprising the association were separately and independently owned; all of them were in partnership or individual ownership, except the Crescent, which was a corporation.

Certain promoters then obtained "options" from the owners of the Enterprise, Empire, Crescent, Equitable, and Delaware potteries; giving a right to purchase these various properties and their business.

The Trenton Potteries Company, the complainant in this suit, was by a certificate filed May 28, 1892, incorporated under the General Corporation Act of New Jersey. Its capital stock was fixed to be

¹ Statement abridged from the report in 56 *New Jersey Equity*, 680. — ED.

issued, \$1,250,000 of preferred stock and \$1,750,000 of common stock. Its objects were stated to be

"to manufacture, buy, sell, and trade in pottery and earthenware and other like products, and in all materials commonly or conveniently used, manufactured, bought and sold in connection therewith, or necessary or convenient in and about the transaction of the said business."

The corporation was organized by the aforesaid promoters, for the purposes hereinafter stated.

July 6, 1892, final conveyances were executed by the owners of the five above-named potteries, to certain promoters, who thereafter conveyed to the Trenton Potteries Co. The sellers also entered into covenants with the purchasers and their assigns, restraining themselves from engaging in the same business. Messrs. Oliphant *et al.* agreed that they would not, nor would either of them directly or indirectly engage in the business of the manufacture of pottery ware, . . . within any State in the U. S. or within the District of Columbia, except in the State of Nevada and the Territory of Arizona, for a period of fifty years; and that this contract should enure to the benefit of, and might be enforced by the Trenton Potteries Company, its successors or assigns.

It was in evidence that, on acquiring control of five of the eight members of the association, the newly formed corporation (The Trenton Potteries Co.) preserved the individuality of each of the potteries which it bought, so that the new corporation had five votes in the association instead of one.

The Vice-Chancellor found, in substance, that the object aimed at by the parties in forming the plaintiff corporation and purchasing the five potteries was to secure power to suppress competition, and to control the production and dictate the prices of sanitary ware pottery; not only as to such pottery made by the plaintiff company, but also as to such pottery when made by any of the members of the American Sanitary Potters' Association.

The Vice-Chancellor advised a decree that the plaintiff's bill be dismissed.

Plaintiff appealed.

Wm. M. Lanning, Garret D. W. Vroom, and Lewis Cass Ledyard (of New York), for appellant.

Samuel D. Oliphant, Jr., Richard V. Lindabury, and Joseph H. Choate (of New York), for respondents.

MAGIE, C. J.

[The court *held, inter alia*, that the contract not to engage in the same business was valid and enforceable, so far as it related to carrying on business within the State of New Jersey.]

It remains to consider whether the contracts in question are otherwise against the public policy of our state. The learned vice-chancellor held them to be opposed to the public interest, because he

conceived that they tended to create a monopoly in the business of manufacturing sanitary pottery ware. This effect he deemed established by the proofs that appellant, simultaneously with its purchase from respondents, also purchased four other plants used in the manufacture of such ware in Trenton, and the property, business, and good will of their owners, and took from each of those vendors contracts restraining them from engaging in the business of manufacturing pottery ware, substantially identical with the contracts taken by it from respondents. The contracts procured from respondents he deemed to be part of a scheme to control the production, distribution, and sale of sanitary pottery ware and to exclude competition therein. Such ware he declared, on the authority of the promoters of appellant, to be a necessity of life.

The scheme held to be reprehensible was found in the situation disclosed in the proofs. Respondents, as owners of the business sold to appellant, had, several years before the sale, united with the owners of seven other potteries in Trenton, which made, among other things, sanitary pottery ware, in an association called the "American Sanitary Potters' Association." That association had in some way controlled the prices at which such ware produced by eight members (counting the owners of each pottery as one member) should be put upon the market. The action of the association in that regard was determined by a majority of its eight members. By its purchases appellant acquired the interest of five of the members, and seems to have been permitted to cast a vote for each in controlling the action of the association. After appellant's purchases prices were so controlled for some time and until the association fell to pieces.

Contracts by independent and unconnected manufacturers or traders looking to the control of the prices of their commodities, either by limitation of production or by restriction on distribution, or by express argument to maintain specified prices, are without doubt opposed to public policy. The contract of the sanitary potters' association in this regard was inimical to public interest when respondents were members of it, and none the less so when appellant acquired the property of five of its members. However solemnly the members of that association may have obligated themselves to obey the behests of the majority in respect of the control of prices of their ware, no court would have enforced their agreements or awarded damages for any breach of them.

But the contracts by which appellant acquired the property and business of respondents and of four other members of the association contained no term stipulating for the continuance of the association or for the enforcement of any objectionable agreements it had entered into. At the most, so far as appears, the contemporaneous purchases by appellant gave it an opportunity to use the majority vote in the association for such control of prices as its agreements provided for. Although the control of the voting majority of the

association may have been one of appellant's motives for making its simultaneous purchases, it is inconceivable that any one of the five vendors could have repudiated his contract to sell to appellant on the ground that such sale, if consummated, would enable appellant to obtain such control. The public interest would be amply protected by invalidating the agreement of the association for the control of prices and the disconnected agreement of sale would be enforced as other contracts.

It is further urged that the simultaneous contracts procured by appellant create, or tend to create, a monopoly, because they stipulate for the removal of many competitors in the business of manufacturing sanitary pottery ware. The owners of five of the eight potteries in Trenton manufacturing that kind of ware (and there were but few, if more than one, elsewhere) thereby agreed not to engage in that business for a long period of time and over a great extent of country. The engagement of respondents in that respect has been found not to be an improper restraint of trade nor inimical to public policy on that ground, but a contract partially enforceable upon respondents, if not otherwise objectionable. The engagements of the other vendors who sold their properties and business to appellant are similar in terms to that entered into by respondents, and furnish a reasonable protection to appellant of the business and good will purchased by it of each of them. Each sale and each incidental contract against competition are, for reasons before given, unobjectionable. Are they rendered objectionable by the fact that, being simultaneously made, they excluded from engaging in the business of manufacturing sanitary pottery ware so large a proportion of those previously engaged in that manufacture?

It is to be observed that the contracts of respondents and the other vendors to appellant restricted them from engaging in the business of manufacturing, not sanitary pottery ware alone, but all pottery ware. The proofs show that a large number of persons are engaged in manufacturing pottery ware in various parts of the country, and that the contracts in question would exclude from competition a very small proportion of them. But as the proofs also show that the main purpose of appellant was to engage in the manufacture of sanitary pottery ware, I have stated the proposition in a more restricted form.

Whether sanitary pottery ware has become a necessity of life is open to question. It is certain that many persons manage to exist without using it. But if its use is of importance to health and comfort, and a considerable and increasing number of persons desire to acquire and use it, the public may have such an interest in its manufacture and sale that public policy will justify judicial interference and refusal to enforce illegal combinations to enhance its price. The elimination of competition may produce that result. The contracts in question were not intended to withdraw, and do not appear to

have withdrawn, from work a single workman in that industry. They restrain a comparatively small number of capitalists who had previously employed their capital in such manufacture from continuing so to do. The entire capital of the country, except theirs, is free to be employed in the manufacture. There seems no ground for the claim that we should refuse to enforce respondents' contracts by injunction when the proofs furnish no reason for the belief that the public will suffer if they are held to their bargains.

The contemporaneous contracts were all made as incidental to the sale and purchase of competing concerns engaged in the manufacture of sanitary pottery ware. They were, as we have seen, reasonably appropriate to the protection of the purchaser in each case. While contracts to restrain or limit competition in the production of that ware may be repugnant to the public interest, such a restraint or limit may result from contracts which the courts are bound to enforce. A person engaged in any manufacture or trade, having the right to acquire and possess property and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restrictions (if such could be imposed) upon the acquisition of such property and its use when so acquired, courts could impose no limitation. They would be obliged to enforce such contracts, notwithstanding the effect was to diminish or even to exclude competition.

But appellant is a corporation and not an individual. Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregations of individuals, organized as prescribed to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold, and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The legislature might have withheld such powers or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish or, for a time

at least, destroy competition. Contracts for such purchases cannot be refused enforcement.

Since contracts by individuals and by corporations having legislative authority, for the purchase of competing plants and business, may be made and are enforceable, although as a result thereof competition is diminished or temporarily destroyed, it further follows that contracts reasonably required to make such purchases effective by protecting the purchaser in the use and enjoyment of the thing purchased, cannot be declared by the courts to be repugnant to public policy. The interference with competition resulting from such purchases under legislative permission, being found not to invalidate contracts for such purchases, the like interference by contracts reasonably required for the protection of the purchaser cannot be held to invalidate them.

The result is that the decree appealed from must be affirmed as to Richard C. and Henry D. Oliphant, but as to the other respondents it must be reversed and a decree be made enjoining them according to the prayer of the bill within the State of New Jersey.

CHAPTER XXVII.

POWER OF CORPORATION TO OWN SHARES IN AN-
OTHER CORPORATION.

BOOTH v. ROBINSON.

1881. 55 *Maryland*, 419.¹

APPEAL from the Circuit Court.

Bill in equity, by certain stockholders in the Powhatan Steamboat Company, against defendants, some of whom were directors in that corporation, to obtain redress for wilful and fraudulent mismanagement of the corporate affairs. Answers were filed, and evidence introduced. It appeared that another corporation, the Steam Packet Company, had purchased about one third of the stock of the Powhatan Company, and that thereafter two of the directors of the Steam Packet Company had been elected directors in the Powhatan Company. It was charged that said directors were parties to a combination formed for the purpose of mismanaging and ruining the Powhatan Company; and that such ruin had been finally accomplished.

R. W. Baldwin, Geo. Hawkins Williams, and S. Teackle Wallis, for appellants.

Randolph Barton and I. Nevett Steele, for appellees.

ALVEY, J.

The first question is, as to the power of the Steam Packet Company to purchase and hold the stock of the Powhatan Company. This, it is contended by the plaintiffs, could not be done without express authority by law. But while some courts have so held, the great weight of authority is the other way. There is nothing in the charter of the Steam Packet Company, or in the nature of its business, that would, in the slightest manner, forbid the exercise of such power; and having money to loan or invest, there would appear to be no good reason why it might not invest in the stock of other corporations as well as in any other funds, provided it be done *bona fide*, and with no sinister or unlawful purpose. The courts of England at one time

¹ Statement abridged. Arguments omitted. Only so much of the case is given as relates to a single point. — ED.

strongly opposed the right of one corporation to deal or invest in the stock of another corporation without express authority for so doing; but that opposition has been entirely overcome, and it is now settled there, that one corporation may deal in the shares of another, without express authority so to do, unless where expressly prohibited, or the nature of its business render it improper so to deal. *Re Barned's Bank, L. R., 3 Ch., 105*; *Re Asiatic Banking Co., L. R., 4 Ch., 252*. In the latter of the cases just cited, Lord Justice SELWYN, in speaking of this power of corporations, said, "As to the capacity of a trading corporation to accept shares in another trading corporation, it is sufficient for me to say that I entirely agree with the judgment of Lord CAIRNS, in the case of *Barned's Banking Company*, viz., that there is not, either by the common or statute law, anything to prohibit one trading corporation from taking or accepting shares in another trading corporation. There may, of course, be circumstances which prohibit or render it improper for a company so to do, having regard to its own constitution, as defined by its memorandum and articles." It is in accordance with this statement, that the law is laid down as settled, by Brice, in his work on *Ultra Vires*, pp. 91, 92. And in this State, the same principle has been fully sanctioned in the case of *Elysville Manf. Co. v. Okisko Co.*, 1 Md. Ch. Dec., 392, and same case affirmed on appeal, in 5 Md., 152. Here, the stock that was purchased on account of the Steam Packet Company was transferred to the names of Robinson and Shoemaker, who held it as trustees for the benefit of the Steam Packet Company; and being thus qualified, they were legally eligible as directors in the Powhatan Company. The fact of their being directors of the Steam Packet Company in no way disqualified them from also being directors of the Powhatan Company. But if there have been as alleged illegality or impropriety in their acts and proceedings in the management of the affairs of the latter named company, such acts and proceedings are subject to different considerations.

[Remainder of opinion omitted.]

SMITH, J., IN PEARSON v. CONCORD RAILROAD, NORTHERN RAILROAD, *et al.*

1883. 62 *New Hampshire*, 537, pp. 548-550.

SMITH, J.

The case finds that the Northern Railroad is the owner of 1290 shares of Concord Railroad stock, purchased in 1873, upon which it has since voted at the meetings of the Concord Railroad. A corporation cannot become a stockholder in another corporation unless such

power is given it by its charter or is necessarily implied in it (*Franklin Co. v. Bank*, 68 Me. 43; *Bank v. Agency Co.*, 24 Conn. 159, Green Bri. Ult. V. 91, and cases cited, Mor. Corp., s. 229 and cases cited), especially if the purchase be for the purpose of controlling or affecting the management of the other corporation. *Sumner v. Marcy*, 3 W. & M. 105; *Central R. R. Co. v. Collins*, 40 Ga. 582; *Hazelhurst v. Savannah &c. R. R. Co.*, 43 Ga. 13; *G. N. R'y Co. v. E. C. R'y Co.*, 21 L. J. Ch. 837; *Booth v. Robinson*, 55 Md. 419, 439. Dealing in stocks is not expressly prohibited in the act of congress providing for the organization of national banks (U. S. Rev. St., s. 5136, par. 7), but such prohibition is implied from the failure to grant the power. *Bank v. Bank*, 92 U. S. 122, 128. Corporations are creatures of the legislature, having no other powers than such as are given to them by their charters, or such as are incidental or necessary to carry into effect the purposes for which they were established. *Downing v. Mt. W. Road Co.*, 40 N. H. 230, 232; *Trustees v. Peaslee*, 15 N. H. 317, 330; *Beaty v. Knowler's Lessee*, 4 Pet. 152; *Perrine v. Company*, 9 How. 172; *Bank v. Earle*, 13 Pet. 519; *Trustees Dartmouth College v. Woodward*, 4 Wheat. 518, 636.

Certain classes of corporations, such as religious and charitable corporations, and corporations for literary purposes, may rightfully invest their moneys in the stock of other corporations. The power, if not expressly mentioned in their charters, is necessarily implied, for the preservation of the funds with which such institutions are endowed, and to render their funds productive. So an insurance company or savings bank may rightfully invest its capital or deposits in the stocks of railroad companies, banks, manufacturing companies, and similar corporations. The power is necessary to enable them to engage in the business for which they are organized, and hence is implied, if not expressly granted, in their charters. Such investments are in the line of their business. On the other hand, a manufacturing or railroad corporation is incorporated to do the business of manufacturing, or transporting passengers and merchandise. Investing their funds in that of other corporations is not in the line of their business. Under extraordinary circumstances it may become necessary for a national bank, or a manufacturing corporation, or a railroad corporation, to acquire stock in another corporation, as in satisfaction of a valid debt, or by way of security, but with a view to its subsequent sale or conversion into money so as to make good or redeem an anticipated loss. *Bank v. Bank*, 92 U. S. 128; *Fleckner v. Bank*, 8 Wheat. 351.

In *Hodges v. N. E. Screw Co.*, 1 R. I. 312, the court said there was no doubt the defendant company might have taken the stock in the Iron Company in payment for its rolling-mill, if it had been taken with a view to sell again, and not permanently to hold it.

The Northern Railroad by its charter was vested with all the powers necessary to carry into effect the purposes and objects of its

incorporation, subject to the laws in relation to corporations and railroads contained in the Revised Statutes. The objects of its incorporation are declared to be the accommodation of the public travel, and the transportation of goods and merchandise. Laws 1844. c. 190. It was not contemplated that more funds would be raised by the issue of stock than was necessary to construct and equip its road. The provision that when the net receipts shall amount to a sum making, with the prior net receipts of the corporation, more than an average of ten per cent. per annum from the commencement of its operations, the excess shall be paid into the treasury of the state, is evidence that the legislature never contemplated the accumulation of a fund from its earnings, or from loans, or from the issue of stock, to be invested in the stock of another railroad corporation. It can no more make a permanent investment of funds in the stock of another road than it can engage in a general banking, manufacturing, or steamboat business. It is neither incidental to the purposes of its incorporation, nor necessary in the exercise of the powers conferred by its charter. If it can purchase any portion of the capital stock of the Concord company, it may buy up the whole, and thus engage in a business for which its charter gives it no authority. And what would hinder a banking corporation from becoming a manufacturing company, or a manufacturing company from becoming a railroad common carrier?

But the facts in this case go further. The stock was bought at \$105 or \$106 per share (par value, \$50), a price largely in excess of its market value, and for the purpose of obtaining control of the Concord, and securing more favorable contracts to itself. In *Sumner v. Marcy*, 3 W. & M. 105, the corporation was chartered to deal in lumber, with a capital of \$150,000, of which only \$75,000 could be invested in personal property, and took stock in a bank to the value of \$168,000, for the purpose of getting control of the bank—a clear violation of its charter, but no more so than in this case. The purchase by a corporation of stock in another corporation will be enjoined at the instance of stockholders, when it involves a misapplication of corporate funds, or is a mere speculation, or is induced by a vicious purpose. *Pierce R. R.* 505. If the investment by one railroad corporation of more than \$135,000 in the stock of another at prices exceeding its market value, for the purpose of controlling such corporation for its own benefit, is not a misapplication of corporate funds, it would be difficult to find a case where such investment would be.

PAGE WOOD, V. C., IN JOINT STOCK DISCOUNT CO. v. BROWN.

1866. *Law Reports, 3 Equity Cases*, 139, pp. 150, 151.¹

PAGE WOOD, V. C.

Then as regards the second branch of the argument, which is this: that assuming this not to be within the clause for making advances and investing in securities, the directors are to do "all such things as they shall consider incidental or conducive to the attainment of the above objects" — it appears to me to be much too wide a construction of that clause to say, that if the transaction in question is not within the scope of the original terms there stated, it can be brought within the scope of doing that which is considered to be incidental to the attainment of the objects, the objects being to use money, by making it available in the shape of a return of interest, or of discount. How do they justify it in this resolution? They say, if we take all these shares in the bank, it will increase our connections. What a prodigious extension I must give to those words in order to bring it within the power of the directors to do anything which they may consider conducive to the interests of the company by increasing its connections, however unconnected with the objects stated! I apprehend those powers must be exercised only for the purpose of doing something *bonâ fide* connected with the objects to be attained, and in the ordinary course of business adapted to their attainment. This was the only ground on which I proceeded in the case of *Taunton v. Royal Insurance Company*, 2 H. & M. 135. There I found that the transaction impeached was in the ordinary course of business, and in the way in which other people conducted their business. In that case, if a large amount of advertisement, or of expenditure of money, had been found necessary, it would have been laid out properly; but to carry the principle on to any remote extension of the objects, on the ground that if shares were bought in this bank there would be some control over the business of the discounting, would be, I apprehend, wholly unwarranted by the plainest rules of construction, which must limit the company's powers to those transactions which are naturally conducive to the objects specified. If the principle were thus extended, it would apply to the buying shares in every sort of

¹ The memorandum, relative to the incorporation of the Joint Stock Discount Company, states certain specific objects for which the company is established, including the discounting of bills and notes; and then adds: "and the doing of all such things as the directors shall consider incidental or conducive to the attainment of the above objects." The directors invested funds of the said company in the shares of a new banking company. The Vice-Chancellor *held*, that such an investment did not come within the objects specifically stated in the memorandum. He then discussed the question whether the investment could be upheld under the general clause above quoted. — Ed.

undertaking — a brewery, for instance, or any other business where discounts might be of use. The company might become shipbuilders, or might be engaged in any other business; they might buy a share in any general merchant's business, because there would be bills in that business which would want discounting, and so they might get more business.

In this case the proceeding is simply an embarking in a totally different business; it is not the buying shares for the purpose of selling them again, or for investment, or anything of that kind, but it is buying shares for the purpose of enlarging the particular business which the company have to conduct. I think that it is clear that the bill must be answered, and the demurrer must be overruled, with costs.

PAGE, J., IN DAVIS v. U. S. ELECTRIC, &c., CO.

1893. 77 *Maryland*, 35, pp. 39, 40.

PAGE, J. . . . There is no question raised as to the power of the Brush Company to purchase and hold the stock of the United States Company. Since the case of *Booth et al. v. Robinson et al.*, 55 Md. 433, it is settled in this State, that "one corporation may deal in the shares of another, without express authority so to do, unless where expressly prohibited, or the nature of its business renders it improper so to deal." But it was contended at the argument, that the Brush Company, occupying the relation which it does to the public, had no right to participate at all in the election of directors. But we think this contention cannot be maintained. If it be conceded that the company can lawfully purchase and hold the stock, then, in the absence of any restriction contained in the charter, it must follow, as an incident to the ownership of the stock, as well as by the express terms of the statute, that it shall have a vote at all meetings of stockholders for each share of stock it may hold. *Mottu et al. v. Primrose*, 23 Md. 501.

In that case the court not only lays down this rule, but proceeds: "While the minority of the stockholders are entitled to protection against the fraudulent or illegal action of the majority, that protection is not to be had by denying to the majority their right annually to elect the Board of Managers."

The gravamen of the complaint made by the bill is, that the Brush Company, having obtained control of the management of the United States Company, is using its power to make that company subservient to its own interest, to use it as a feeder, and finally utterly to destroy it, whenever it shall be to their profit so to do. This, as was said in *Booth v. Robinson* (*supra*), would be a fraud of the most flagrant char-

acter. It would subject the corporation at whose instance the scheme was devised and executed, not only to a civil liability for the injury done, but also to the penalties of misuser or abuser of its franchises; and in such a case "courts can neither be too emphatic in condemning the act, nor too ready to afford the strongest remedy allowed by law for the prevention or redress of the wrong." In this case, the relief prayed for must be granted, if at all, in the exercise of the ordinary powers of a court of equity.

BLANCHARD, J., IN STATE *ex rel.* JACKSON v. NEWMAN.

1899. 51 *Louisiana Annual*, 833, pp. 837-839.

BLANCHARD, J. . . . Conceding that under some circumstances one corporation may not unlawfully acquire holdings of stock in another corporation, such holdings, we think, do not partake of the fulness of perfect ownership as defined by the Civil Code (Art. 491) giving "the right to use, to enjoy, and to dispose of . . . in the most unlimited manner."

They rather come under the head of what the Code (Art. 492) describes as "imperfect ownership," which only gives the right of enjoying and disposing of property when it can be done without injuring the rights of others.

For instance, when under circumstances tolerating it, a corporation, not possessing the express or necessarily implied power to do so, acquires stock in another corporation, it may collect dividends on the same and may at will dispose of it, and yet not have the power to vote the stock at elections for officials to govern and manage the affairs of the other corporation.

This is sustained by both reason and authority and founded in the public policy of the State.

If a corporation, like the N. O. Gas Light Co., formed to manufacture and sell gas *within certain limits* of the city of New Orleans, is permitted to acquire a controlling interest in the stock of another gas company authorized to make and sell gas *in another part* of the city, and by such controlling interest to practically take possession and manage the affairs of such other corporation, it, in effect, is equivalent to engaging in a business other than that authorized in its charter, and this is in direct violation of the fundamental law. Constitution 1879, Art. 237; Constitution 1898, Art. 265.

The public policy of a State is manifested by its fundamental law, or by legislation enacted in pursuance thereof, and that it is the duty of the judiciary to refuse to sustain that which is against public policy is beyond cavil.

In *Milbank v. N. Y. Lake Erie & Western R. R. Co.*, 64 Howard

Practice Reports, 20, it was held by the Supreme Court of New York that though a railroad corporation may take title to all kinds of personal property, including stock of other railroad corporations, to secure debts due it, the investment by a railroad company of its corporate funds in the purchase of the stock of another corporation is not necessary in the exercise of any of its corporate powers, is unauthorized, in violation of the statute, and, consequently, *ultra vires*. Further, that while a railroad corporation remains the owner of the stock of another corporation it may collect and receive dividends thereon, and has the right to sell and dispose of the same, it has *no right to vote thereon*.

To the same effect is the ruling of the Supreme Court of Alabama in *Memphis & Charleston R. R. Co. v. Woods*, 88 Ala. 631.

See, also, *Central R. R. Co. v. Collins*, 40 Ga. 582; *Hazelhurst v. Savannah G. & N. R. R. Co.*, 43 Ga. 13; and 130 Ill. 268.

The conclusion reached is that the N. O. Gas Light Co. could not legally vote the shares of stock in the Jefferson City Gas Light Co., owned and held by it, either in its own name or in the names of other persons, at the election held for directors on the 7th day of November last, and not having such legal right it is without just cause of complaint that its vote was not received and counted.

CALIFORNIA NATIONAL BANK v. KENNEDY.

1897. 167 *United States*, 362.¹

ERROR to the Supreme Court of California.

Kennedy, the original plaintiff, is a creditor of the California Savings Bank, which is now insolvent. He seeks to recover against the California National Bank, upon the ground that it was a stockholder in the Savings Bank and consequently liable under the statute of California to pay the debts of the Savings Bank in proportion to the amount of stock held therein by the National Bank. It appeared that a certificate for shares in the Savings Bank was issued in the name of the California National Bank, and that the National Bank received dividends on savings bank stock. At the hearing the National Bank made the point that the Savings Bank stock was not taken by the National Bank in the ordinary course of the business of the National Bank as security for the payment of a debt or otherwise. It was also contended that the National Bank could not in law become a stockholder or incorporator in any other corporation. The Supreme Court of California rendered judgment against the National Bank. 101 *California*, 495.

Edward Winslow Paige, for plaintiff in error.

¹ Statement abridged. Part of opinion omitted.—ED.

George Fuller, H. E. Doolittle, and T. L. Lewis, for defendant in error.

WHITE, J.

The Federal questions which therefore arise on the record may be thus stated: 1st, do the statutes of the United States, Rev. Stat. § 5136 *et seq.*, relating to the organization and powers of national banks, prohibit them from purchasing or subscribing to the stock of another corporation? and, 2d, if a national bank does not possess such power, can the want of authority be urged by the bank to defeat an attempt to enforce against it the liability of a stockholder?

As to the first question. — It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. *Logan County Bank v. Townsend*, 139 U. S. 67, 73. No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may in the usual course of doing such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. *National Bank v. Case*, 99 U. S. 628. So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. *First National Bank v. National Exchange Bank*, 92 U. S. 122, 128.

On behalf of the plaintiff below it was admitted at the trial that the stock of the savings bank was not "taken as security or anything of the kind," and it is not disputed in the argument at bar that the transaction by which the stock was placed in the name of the bank was one not in the course of the business of banking for which the bank was organized.

2. *The transfer of the stock in question to the bank being unauthorized by law, does the fact that, under some circumstances, the bank might have legally acquired stock in the corporation estop the bank from setting up the illegality of the transaction?*

Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act. The cases of *Thomas v. Railroad Company*, 101 U. S. 71; *Pennsylvania Railroad v. St. Louis, Alton & c. Railroad*, 118 U. S. 290; *Oregon Railway & Navigation Co. v. Oregonian Railway Co.*,

130 U. S. 1; *Pittsburgh, Cincinnati &c. Railway v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 371; *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24; *St. Louis &c. Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S. 393; *Union Pacific Railway v. Chicago &c. Railway*, 163 U. S. 564, and *McCormick v. Market Nat. Bank*, 165 U. S. 538, recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute, and that, to quote from the opinion of the court in *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 59 to 60:—

“A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.”

This language was also cited and expressly approved in *Jacksonville &c. Railway v. Hooper*, 160 U. S. 514, 524, 530.

As said in *McCormick v. Market National Bank*, 165 U. S. 538, 549:—

“The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. *Pearce v. Madison & Indianapolis Railroad*, 21 How. 441; *Pittsburgh, Chicago &c. Railway v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 371, 384; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 48.”

The doctrine thus enunciated is likewise that which obtains in England. *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653; *Attorney-General v. Great Eastern Railway Co.*, 5 App. Cas. 473; *Baroness Wenlock v. The River Dee Company*, 10 App. Cas. 354; *Trevor v. Whitworth*, 12 App. Cas. 409; *Oregon Gold Mining Co. of India v. Roper*, (1892) App. Cas. 125; *Mann v. Edinburgh North-eastern Tramways*, (1893) App. Cas. 69.

Applying the principles of law thus settled to the case at bar, the result is free from doubt.

The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers ex-

pressly conferred. A dealing in stocks is consequently an *ultra vires* act. Being such, it is without efficacy. *Pearce v. Railroad Company*, 22 How. 441, 445. Stock so acquired creates no liability to the creditors of the corporation whose stock was attempted to be transferred. (Cook on Stock and Stockholders, vol. 1, p. 435, note 1 to sec. 316, and authorities there cited.)

In *The Royal Bank of India's Case*, L. R. 4 Ch. 252 (1869), while it was held by the Court of Appeal that, as incidental to the power to advance money on a deposit of shares of stock, a corporation might do such acts as were reasonable and proper for making the security available, it was conceded that a purchase of stock of another company as a speculation would have been *ultra vires*, and, despite acts of ownership exercised by the company, the shares might be repudiated at any time.

Sir C. Selwyn, L. J., said (p. 261) : —

"If it could have been shown that it was an act absolutely prohibited by their memorandum of articles of association, then, no doubt, a different question would have arisen; the act would have been *ultra vires* and incapable of confirmation or ratification."

Sir G. M. Giffard, L. J., said (p. 262) : —

"I quite agree that the Royal Bank of India had no authority to speculate in shares, and that if it had gone upon the Stock Exchange and bought shares as a speculation, such a proceeding would have been *ultra vires*, and all that has taken place would not have been enough to constitute the Royal Bank of India shareholders in this bank, or prevent them from repudiating these shares."

The circumstance that the dealing in stocks by which, if at all, the stock of the California Savings Bank was put in the name of the California National Bank, was one entirely outside of the powers conferred upon the bank, and was in no wise the transaction of banking business or incidental to the exercise of the powers conferred upon the bank, distinguishes this case from the class of cases relied upon by the defendant in error. *National Bank v. Whitney*, 103 U. S. 99; *National Bank v. Matthews*, 98 U. S. 621. The difference between those cases and one like this was referred to in *McCormick v. Market National Bank of Chicago*, *supra*, and it is, therefore, unnecessary to particularly review them. The claim that the bank in consequence of the receipt by it of dividends on the stock of the savings bank is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void, could not be confirmed or ratified. As was said by this court in *Union Pacific Railway v. Chicago &c.*

Railway, 163 U. S. 564, speaking through Mr. Chief Justice Fuller (p. 581):—

“A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel.”

It follows from the foregoing that the judgment of the Supreme Court of California against the bank was erroneous, and it must, therefore, be

*Reversed.*¹

MR. JUSTICE HARLAN dissented.

¹ Reaffirmed in *First Nat'l Bank v. Hawkins*, A. D. 1899, 174 U. S. 364.

But see *Citizens', &c., Bank v. Hawkins*, A. D. 1896, 71 Federal Reporter, 369; *White v. Marquardt*, A. D. 1898, 105 Iowa, 145; BARTHOLOMEW, C. J., in *Tourtlot v. Whished*, A. D. 1900, 9 North Dakota, 467, pp. 478-480.—ED.

CHAPTER XXVIII.

POWER OF CORPORATION TO PURCHASE ITS OWN SHARES.

DUPEE v. BOSTON WATER POWER CO.

1873. 114 Mass. 37.¹

BILL IN EQUITY by minority stockholders in defendant corporation, to restrain the corporation from selling land and receiving its own stock in part payment.

C. B. Goodrich, for plaintiffs. Selling land of the corporation, and receiving payment of the purchase money in whole or in part, at the election of the purchaser, in the shares of the capital stock of the corporation, is a breach of trust. This is especially true when it is proposed to receive the shares at a sum much above the market value. It operates to the prejudice and injury of such of the shareholders as are unable or unwilling to purchase the land owned by the corporation. It is in effect a dividend, or return of capital to a portion of the stockholders, to the exclusion of others. It effects a reduction of the capital stock of the corporation in a manner not authorized by law. The defendant corporation has no power under its original charter to reduce its capital stock; if it has such power, it is derived from Sts. 1870, c. 224, § 24, and 1871, c. 110. The Boston Water Power Company has no authority to reduce its capital stock by a purchase thereof for the purpose of cancellation, or for a resale thereof. A reduction of its capital stock, if allowable in any case, must be by a particular course of proceeding provided by statutes, cited above.

[Remainder of argument omitted.]

D. Foster & G. W. Baldwin, for defendants.

COLT, J. This case is heard upon bill and answers. No issue is joined upon the truth of the defendants' allegations, and the only questions of law are those which arise upon the facts thus presented.

At an annual meeting of the defendant corporation it was voted that the directors be authorized, "if in their judgment the interest of the company will be thereby promoted, to receive in part payment for

¹ Statement abridged. Only so much of the opinion is given as relates to a single point. — Ed.

the land of the company hereafter to be sold, the stock of the company, at such price for the land and the stock as may be deemed for the interest of the stockholders." Under this authority the directors advertised a number of lots belonging to the corporation to be sold at public auction, and paid for, at the option of the purchaser, one half in cash, and one half in the stock of the corporation at a price named [viz., \$75 per share]. There is no other action of the corporation or its directors, past or contemplated, relied on to support the bill. The prayer is that the defendants be enjoined and restrained from selling the company's lands by auction, or otherwise, in the mode proposed.

There is nothing in this vote of the corporation, or in the action of the directors, which amounts to a reduction of capital, or will amount to it, if the proposed sales take place. That must depend on future corporate action.

The only questions left upon the pleadings are, whether sales may be lawfully made of the company lands under the vote of the stockholders, at the annual meeting, to be paid for in its own stock at a price agreed, which price does not exceed its intrinsic value as based upon a reasonable estimate of its corporate property; and whether the agreement to fill the lots sold to the usual grade can be lawfully entered into.

In the absence of legislative provision to the contrary, a corporation may hold and sell its own stock, and may receive it in pledge or in payment in the lawful exercise of its corporate powers. *Leland v. Hayden*, 102 Mass. 542. *American Railway-Frog Co. v. Haven*, 101 Mass. 398. *Nesmith v. Washington Bank*, 6 Pick. 324, 329. *Coleman v. Columbia Oil Co.* 51 Penn. State, 74. *City Bank of Columbus v. Bruce*, 17 N. Y. 507. *Ex parte Holmes*, 5 Cowen, 426.

We cannot see that the rights of any of the stockholders will be illegally prejudiced by the proposed receipt of the shares in payment for its land.

Bill dismissed with costs.

LOWE v. PIONEER THRESHING CO.

1895. 70 *Federal Reporter*, 646.

NELSON, J.

The records of the corporation show that on June 25, 1895, at a stockholders' meeting, the following resolution was proposed and adopted, three persons representing stock voting in the negative:

"Resolved, that we, the stockholders of the Pioneer Threshing Company, do hereby instruct the board of directors elect to take the following action, at any time after this meeting, during their term of office, if in their judgment they deem such action advisable: (1) To buy from the resident stockholders of Faribault, and those joining with them, the stock issued on account of removal of the business of the company from Minneapolis, and pay therefor in plant, machinery, etc., property or assets of the company."

It is a mooted question in this country as to whether a corporation may purchase shares of its own stock. Many states forbid it. In the absence of a charter prohibition or a statute forbidding it, there is no reason why the stock should not be purchased, at least with the profits derived from the business of the corporation, where all the stockholders assent thereto. The tendency of the decisions in the state of Minnesota is on this line. See *State v. Minnesota Thresher Manuf'g Co.*, 40 Minn. 227, 41 N. W. 1020. But in the case at bar the purchase of the stock was to be made by a transfer of nearly all the assets and property of the corporation to a few favored stockholders, and, evidently, there would be no equal exchange in value. This, it seems to me, would be in fraud of the rights of the minority stockholders, who protested against the resolution to make this purchase of stock. I shall therefore refuse the motion for the appointment of a receiver, but shall order an injunction, restraining the directors from carrying out the plan contemplated by the resolution of June 25, 1895.

A decree will be entered accordingly.

TREVOR v. WHITWORTH.

1887. *Law Reports, 12 Appeal Cases*, 409.¹

APPEAL from a decision of the Court of Appeal.

James Schofield & Sons Limited were incorporated in 1865 under the Companies Act 1862 with a capital of £150,000 in 15,000 shares of £10 each. The objects, as stated in the memorandum of association, were to acquire and carry on the business of certain flannel manufacturers, and any other businesses and transactions which the company might consider to be in any way conducive or auxiliary thereto, or proper to be carried on in connection therewith.

The memorandum did not authorize the company to purchase its own shares; but the articles of association purported to authorize such purchases.

The company having, in 1884, gone into liquidation, a claim was made against the company by the respondents, as executors of Whitworth, a deceased shareholder, for the balance of the price of Whitworth's shares sold by the executors to the company in 1880, and not wholly paid for.

The Vice Chancellor of the County Palatine of Lancaster disallowed the claim.

The Court of Appeal (Cotton, Bowen and Fry L.JJ.) reversed this decision and allowed the claim. Against this last decision the official liquidators now appealed.

Rigby Q. C., and *O. Leigh Clare*, for appellants.

Romer Q. C., and *A. C. Maberley*, for respondents.

LORD HERSCHELL.

I pass now to the main question in this case, which is one of great and general importance, whether the company had power to purchase the shares. The result of the judgment in the Court below is certainly somewhat startling. The creditors of the company which is being wound up, who have a right to look to the paid-up capital as the fund out of which their debts are to be discharged, find coming into competition with them persons who, in respect only of their having been, and having ceased to be, shareholders in the company, claim that the company shall pay to them a part of that capital. The memorandum of association, it is admitted, does not authorize the purchase by the company of its own shares. It states, as the objects for which the company is established, the acquiring certain manufacturing businesses and the undertaking and carrying on the businesses so acquired, and any other business and transaction which the company consider to be

¹ Statement abridged. Arguments and portions of opinions omitted. — ED.

in any way auxiliary thereto, or proper to be carried on in connection therewith.

It cannot be questioned, since the case of *Ashbury Railway Carriage and Iron Company v. Riche*,¹ that a company cannot employ its funds for the purpose of any transactions which do not come within the objects specified in the memorandum, and that a company cannot by its articles of association extend its power in this respect. These propositions are not and could not be impeached in the judgments of the Court of Appeal, but it is said to be settled by authority, that although a company could not under such a memorandum as the present, by articles authorize a trafficking in its own shares, it might authorize the board to buy its shares "whenever they thought it desirable for the purposes of the company," or "in cases where it was incidental to the legitimate objects of the company that it should do so." The former is Lord Justice Cotton's expression; the latter that of Lord Justice Bowen.

I will first consider the question apart from authority, and then examine the decisions relied on.

The Companies Act 1862 requires (sect. 8) that in the case of a company where the liability of the shareholders is limited, the memorandum shall contain the amount of the capital with which the company proposes to be registered, divided into shares of a certain fixed amount; and provides (sect. 12) that such a company may increase its capital and divide it into shares of larger amount than the existing shares, or convert its paid-up shares into stock, but that "save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association."

What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the Legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders.

Experience appears to have shewn that circumstances might occur in which a reduction of the capital would be expedient. Accordingly, by the Act of 1867 provision was made enabling a company under strictly defined conditions to reduce its capital. Nothing can be stronger than these carefully-worded provisions to shew how inconsistent with the

¹ Law Rep. 7 H. L. 653.

very constitution of a joint stock company, with limited liability, the right to reduce its capital was considered to be.

Let me now invite your Lordships' attention to the facts of the present case. The company had purchased, prior to the date of the liquidation, no less than 4142 of its own shares; that is to say, considerably more than a fourth of the paid-up capital of the company had been either paid, or contracted to be paid, to shareholders, in consideration only of their ceasing to be so. I am quite unable to see how this expenditure was incurred in respect of or as incidental to any of the objects specified in the memorandum. And, if not, I have a difficulty in seeing how it can be justified. If the claim under consideration can be supported, the result would seem to be this, that the whole of the shareholders, with the exception of those holding seven individual shares, might now be claiming payment of the sums paid upon their shares as against the creditors, who had a right to look to the moneys subscribed as the source out of which the company's liabilities to them were to be met. And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result. I do not think it was disputed that a company could not enter upon such a transaction for the purpose of reducing its capital, but it was suggested that it might do so if that were not the object, but it was considered for some other reason desirable in the interest of the company to do so. To the creditor, whose interests, I think, sects. 8 and 12 of the Companies Act were intended to protect, it makes no difference what the object of the purchase is. The result to him is the same. The shareholders receive back the moneys subscribed, and there passes into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stock available to meet the demands of the creditors:

What was the reason which induced the company in the present case to purchase its shares? If it was that they might sell them again, this would be a trafficking in the shares, and clearly unauthorized. If it was to retain them, this would be to my mind an indirect method of reducing the capital of the company. The only suggestion of another motive (and it seems to me to be a suggestion unsupported by proof) is that this was intended to be a family company, and that the directors wanted to keep the shares as much as possible in the hands of those who were partners, or who were interested in the old firm, or of those persons whom the directors thought they would like to be amongst this small number of shareholders. I cannot think that the employment of the company's money in the purchase of shares for any such purpose was legitimate. The business of the company was that of manufacturers of flannel. In what sense was the expenditure of the company's money in this way incidental to the carrying on of such a business, or how could it secure the end of enabling the busi-

ness to be more profitably or satisfactorily carried on? I can quite understand that the directors of a company may sometimes desire that the shareholders should not be numerous, and that they should be persons likely to leave them with a free hand to carry on their operations. But I think it would be most dangerous to countenance the view that, for reasons such as these, they could legitimately expend the moneys of the company to any extent they please in the purchase of its shares. No doubt if certain shareholders are disposed to hamper the proceedings of the company, and are willing to sell their shares, they may be bought out; but this must be done by persons, existing shareholders or others, who can be induced to purchase the shares, and not out of the funds of the company.

It is urged that the views I have expressed are inconsistent with the forfeiture and surrender of shares in a company. I do not think so. The forfeiture of shares is distinctly recognised by the Companies Act, and by the articles contained in the schedule, which in the absence of other provisions regulate the management of a limited liability company. It does not involve any payment by the company, and it presumably exonerates from future liability those who have shewn themselves unable to contribute what is due from them to the capital of the company. Surrender no doubt stands on a different footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid. There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by the late Master of the Rolls in *In re Dronfield &c. Co.*:¹ "It is not for me to say what the limits of surrender are which are allowable under the Act, because each case as it arises must be decided upon its own merits."

I turn now to the authorities. In *Teasdale's Case*² Lord Justice James said: "There is no doubt that a company may give itself power to purchase its own shares, to take surrenders of shares, and to cancel the certificates of shares." But in the subsequent case of *Hope v. International Financial Society*³ that learned judge said: "I am reported to have said in *Teasdale's Case*² that the power to purchase shares would be good. I am not quite sure whether that was not too wide a deduction from the cases to which I was then referring, and certainly it was not necessary for the decision of the case. But however that may be, when the company deals with an individual shareholder, and does what appears to be right under the circumstances, viz. to accept the surrender from the shareholder who cannot pay, and to

¹ 17 Ch. D. 76.

² Law Rep. 9 Ch. 54.

³ 4 Ch. D. 327, 836.

release him from further liability, that might be good, although incidentally and to a small extent it may be said to diminish the capital." In the case which gave rise to these observations, a company having 150,000 shares issued, passed a special resolution that the directors should have power to apply the company's assets to purchase from shareholders willing to sell any number of shares not exceeding 100,000, and that such shares should not be re-issued by the directors without the authority of a general meeting. The Court of Appeal, affirming Vice-Chancellor Bacon, held that this scheme was invalid. Lord Justice James said: "Either this is a purchase of shares in the sense of trafficking in shares, which is a purchase not authorized by the memorandum of association, or it is an extinguishment of the shares, and therefore a reduction of the capital of the company." And the present Master of the Rolls made the following observations: "I agree with the Lord Justice that the dilemma is made perfect; for if you assume that there was to be a re-issue of these shares, the shares are not cancelled, they are existing shares, and the only way of getting rid of them again is to sell them. It is said that a selling of shares is not of itself a trafficking in shares. Well, that may be quite true. If I make a present of a horse I cannot be said to be dealing in horses, but I apprehend if I buy a horse for the purpose of selling it again, I do deal in a horse. So here, if you take that to be the reasonable meaning of the resolution, then the resolution is this, that the company are to buy the shares for the purpose of re-issuing them, that is, for the purpose of selling them again. They do not say so in terms, but that is the necessary effect of what they intend to do by the resolution. That seems to be a trafficking in shares and a carrying on of the business which is not within the terms of the memorandum of association. It is true that that may not be a continuing business, but no more was that which was done in the case of the *Ashbury Railway Carriage and Iron Company v. Riche*. That was only to be one transaction, but because the transaction was a business transaction not contemplated or mentioned in the memorandum of association, it was not allowed. If that therefore was the intention of this resolution, then it broke the rules, by enabling or forcing the company to enter upon a business which is not mentioned in the memorandum of association. But if it was not intended to re-issue these shares, then it seems to me to follow that the amount of capital represented by them was necessarily extinguished."

It appears to me that every word which I have just quoted from the judgment of the Master of the Rolls is strictly applicable to the circumstances of the present case. Again, in the case of *Guinness v. Land Corporation of Ireland*,² Lord Justice Cotton, after referring to sect. 38 of the Companies Act, said: "From that it follows that whatever has been paid by a member cannot be returned to him. In my opinion, it also follows that what is described in the memorandum

¹ Law Rep. 7 H. L. 653.

² 22 Ch. D. 349, 375.

as the capital cannot be diverted from the objects of the society. It is, of course, liable to be spent or lost in carrying on the business of the company, but no part of it can be returned to a member so as to take away from the fund to which the creditors have a right to look as that out of which they are to be paid."

The learned judges of the Court of Appeal in the present case did not purport to depart from the views thus expressed, but their judgments were based upon the decision of that Court in the case of *In re Dronfield Silkstone Coal Company*.¹ In that case disputes having arisen as to the conduct of the business, the directors agreed with Ward, one of the largest shareholders, to purchase his shares and also his interest as landlord in the mines worked by the company. This arrangement was confirmed by an extraordinary general meeting of the company, and was carried into effect in March 1872. The business of the company was very prosperous for several years, but in 1879 it was ordered to be wound up, and the question then arose whether Ward was liable to be placed on the list of contributories. The late Master of the Rolls held that he was, on the ground that the company had no power to purchase the shares, but this decision was reversed by the Court of Appeal. Upon the question whether the company had the power contended for, I agree with the reasoning of the Master of the Rolls rather than with that of the Court of Appeal. But I am not prepared to say that the judgment of the Court of Appeal refusing to make Ward a contributory was erroneous, looking at the circumstances which intervened subsequent to the purchase, and prior to the winding-up. It is not necessary, however, to detain your Lordships by a consideration of this question, as it can have no application to the present case. The transaction here is *inchoate*, and the Court is asked to compel its completion. This, I think, for the reasons I have given, they would not be justified in doing.

I ought to notice one other case, as it was much relied on by the learned counsel for the respondents. I refer to *Phosphate of Lime Company v. Green*.² In that case the learned judges appear to have considered that the transaction amounted to a purchase of shares in the company, which was prohibited by its articles of association, but they held that it had been ratified by the shareholders. No question was raised in argument or determined as to the powers conferred by the memorandum of association, and it is to be observed that at that time it was not so clearly settled as it has been since the judgment in *Ashbury Railway Carriage and Iron Company v. Riche*,³ that a transaction not within the scope of the memorandum is incapable of ratification.

I move your Lordships that the judgment appealed from be reversed, and the judgment of the Vice-Chancellor restored, and that the respondents do pay to the appellants the costs in the Court of Appeal and

¹ 17 Ch. D. 76.

² Law Rep. 7 C. P. 43.

³ Law Rep. 7 H. L. 653.

in this House, and do repay to the appellants any moneys and costs received from them.

LORD WATSON.

In the case of a company limited by shares, the Act of 1862 requires that the amount of its capital, and the shares into which it is divided, shall be set forth in the memorandum of association; and sect. 12, which prescribes the extent to which the conditions contained in the memorandum may be modified, empowers the company to increase but not to diminish its capital. That limitation has been so far relaxed by the Act of 1867 as to permit a company to reduce its capital, with the sanction of the Court, after due notice to creditors, upon such terms as the Court may think fit to impose. The Act of 1877, upon the preamble that doubts had been entertained whether the power of reduction given by the preceding Act extended to paid-up capital, enacts (sect. 3) that the word "capital," as used in that Act, shall include paid-up capital. That declaration clearly expresses the will of the legislature that neither the paid-up nor the nominal capital of the company shall be reduced otherwise than in the manner permitted by the statutes.

When a share is forfeited or surrendered, the amount which has been paid upon it remains with the company, the shareholder being relieved of liability for future calls, whilst the share itself reverts to the company, bears no dividend, and may be re-issued. When shares are purchased at par, and transferred to the company, the result is very different. The amount paid up on the shares is returned to the shareholder; and in the event of the company continuing to hold the shares (as in the present case) is permanently withdrawn from its trading capital. It appears to me that, as the late Master of the Rolls pointed out in *In re Dronfield Silkstone Coal Company*,¹ it is inconsistent with the essential nature of a company that it should become a member of itself. It cannot be registered as a shareholder to the effect of becoming debtor to itself for calls, or of being placed on the list of contributories in its own liquidation. Accordingly, when a company buys and holds its own shares, the device is sometimes resorted to of taking the transfer to a nominee, who is entered in the register, and holds the shares as trustee for the company, which undertakes to indemnify him from future calls. In that case, if the company goes into liquidation before its capital is fully paid up, the trustee is liable personally as a contributory for the amount then unpaid; but the amount withdrawn is never restored, and calls made upon the shares whilst the company is a going concern bring no addition to its capital.

The respondents are not resisting an attempt by the liquidators to include them in the list of contributories; they are seeking to enforce

¹ 17 Ch. D. 76. 83.

in a question with creditors the contract under which their shares were transferred to the company, and their success must depend upon the validity of that contract.

[The concurring opinion of LORD FITZGERALD is omitted.]

LORD MACNAGHTEN.

There remains, however, a more serious objection still. It seems to me that if a power to purchase its own shares were found in the memorandum of association of a limited company, it would necessarily be void. There are two conditions of the memorandum — the condition defining the objects of the company, and the condition defining its capital, — one or both of which would be affected by such a power. It must, therefore, be considered in connection with each. Suppose the dealing in its own shares were stated as an object for which a company was proposed to be established, could it be said that the subscribers were associated for a “lawful purpose” within the meaning of sect. 6 of the Act of 1862? If it were the only object of the company, no one would say so. Does the purpose of the association become lawful if legitimate objects are combined with an object which is not legitimate? It is significant that the Stock Exchange will not grant a settling day, or allow a quotation to any company which purports to have the power of buying its own shares. But let me suppose a case where the purchase of its own shares is not one of the objects of the company, properly so-called, but a case where the subscribers to the memorandum think that the power of purchasing its own shares might be useful in the management of the company if it were permissible by law. Then it seems to me that one way of trying whether it is permissible or not would be to read it into the memorandum in connection with the condition which states what the capital is to be. Let me try it here in that way, using the very language of Cotton L.J., who thought the power in the present case valid, because it was only “a power to authorize the board, whenever they thought it desirable for the purposes of the company, to buy the shares.” The condition would then run thus: “The capital of the company is £150,000 in 15,000 shares of £10 each; but the board may buy back shares whenever they think it desirable for the purposes of the company to do so.” It seems to me that a condition so qualified would be repugnant and contradictory to itself. At any rate, the qualification would have the effect of reducing one of the statutory conditions of the memorandum to an empty form.

So far I have not relied upon the Acts of 1867 and 1877, which are to be construed as one with the Act of 1862, because I think the question is clear on the earlier Act; but I may say that the Act of 1867, as explained by the Act of 1877, seems to prohibit a company from purchasing its own shares, except under certain stringent conditions. When Parliament sanctions the doing of a thing under certain con-

ditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed. Now the Act of 1862 makes no provision for reduction of capital. The Act of 1867 allows a limited company to reduce its capital under conditions which carefully protect the interests of creditors. The Act of 1877 explains that the power to reduce capital includes a power "to pay of any capital which may be in excess of the wants of the company," and it dispenses with some of the prescribed conditions when the reduction does not involve either the diminution of any liability in respect of unpaid capital, or "the payment to any shareholder of any paid-up capital." It follows that if the operation be effected by payment of capital to any one shareholder, all the prescribed conditions must be followed. Payment of capital to any one shareholder is just as much a reduction of capital, and just as detrimental to the interests of creditors, as the payment of the same amount among all the shareholders rateably. It is none the less a payment off of capital within the meaning of the Act of 1867, as explained by the Act of 1877, because the shareholder to whom the payment is made renounces in return the right to participate in the joint stock of the company.

One word with regard to powers of forfeiture and surrender of shares, which were referred to in argument as affording some support to the views of the respondents. Forfeiture is contemplated by the Act of 1862; it is mentioned in sect. 26; every company is to return to the registrar of joint-stock companies once a year "the total amount of shares forfeited." There can be no question as to the power of a company in a proper case to forfeit shares. Surrender of shares stands on a different footing. It is not mentioned in the Companies Acts, but I conceive there can be no objection to the surrender of shares which are liable to forfeiture. A surrender of shares in return for money paid by the company is a sale, and open to the same objections as a sale, whatever expression may be used to describe or disguise the transaction.

The present case is wholly different from *In re Dronfield Silkstone Coal Company*.¹ There it was sought to undo a transaction which could not be undone altogether so as to restore the parties to their original position, and which could not be undone at all without committing injustice. Here the applicants are seeking to enforce against the company a contract which has not yet been fully performed and which was beyond the powers of the company.

*Order appealed from reversed. Order of the Vice Chancellor restored.*²

¹ 17 Ch. D. 76.

² See TYSON, J., in *Hall v. Henderson*, 126 Alabama, 449, pp. 480-482; and BRADFORD, J., in *Hamor v. Taylor-Rice, &c., Co.*, 84 Federal Reporter, 392, pp. 396-399. — Ed.

CLAPP v. PETERSON.

1882. 104 *Illinois*, 26.¹

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook County; the Hon. William H. Barnum, Judge, presiding.

Isham, Lincoln, Burry & Ryerson, for appellants.

Page & Plum, for appellee.

SHELDON, J. By the will of her step-son, P. W. Bonner, who died in July, 1870, appellee, Georgie H. Peterson, a resident of the State of New York, became owner of all personal property left by said Bonner, and in September, 1870, on application made to her in New York, she sold all said property to the Illinois Land and Loan Company. On November 20, 1874, she filed her bill against said company to set aside such sale, and for other relief in respect thereto, on the ground that she had been induced to make the sale through the fraudulent misrepresentations of the company, for an inadequate consideration, and on May 1, 1877, she obtained in the suit a money decree against the company for \$5653.33. An execution issued upon the decree having been returned *nulla bona*, Mrs. Peterson, on September 18, 1879, filed her bill in chancery in the present case, to subject property in the hands of Caleb Clapp to the payment of this decree. A decree was entered in her favor granting the relief sought, which, on appeal to the Appellate Court for the First District, was affirmed, and the present appeal taken to this court.

It appears that the Illinois Land and Loan Company was chartered by an act of the legislature in 1867, with a capital stock of \$100,000, with 1000 shares, of \$100 each, all of which was paid in. Caleb Clapp, a non-resident of the State, was a stockholder in the company, and in January, 1874, he surrendered to the company 555 shares of stock, in consideration of which the company executed to him a deed of warranty of two lots in Chicago, one of the value of \$50,000, and the other of the value of \$5500, that amount being the consideration stated in the deed. The stock was canceled, and was considered, at the time, of par value. Mr. Clapp continued to be till his death, and his estate still is, the owner of the lots. It is these lots which are sought to be subjected to the payment of said money decree against the company.

The legal principle which appellants' counsel lays down and insists upon as applying to the case, is, that corporations may purchase their own stock in exchange for money or other property, and hold, re-issue or retire the same, provided such act is had in entire good faith, is an exchange of equal value, and is free from all fraud, actual or constructive, this implying that the corporation is neither insolvent nor in process of dissolution. We think there must be added to the proposition the further condition that the rights of creditors are not affected.

¹ Arguments omitted. — ED.

The doctrine so elaborately urged by appellants' counsel, that a corporation has the power to purchase its own stock, seems well enough settled, and was asserted by this court in *Chicago, Pekin and South-western R. R. Co. v. Marseilles*, 84 Ill. 643. Yet, in so holding there, the qualification was added, that, in equity, the transaction might be impeached if it operated to the injury of creditors. We see nothing to show that the transaction in the present case was not in good faith, that there was any element of fraud about it, or that there was anything in the apparent condition of the company to interfere with the making of the exchange that was had. It is only as injuriously affecting the interests of creditors, we think, that the transaction can be questioned, and it is in that view that it must be considered and passed upon.

In *Sanger v. Upton*, 91 U. S. 60, it is laid down: "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private co-partnerships. When debts are incurred a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice. It is publicly pledged to those who deal with the corporation for their security." This doctrine is abundantly established by the authorities. 2 Story's Equity Jur. sec. 1252; *Wood v. Dummer*, 3 Mason, 308; *Spear v. Grant*, 15 Mass. 505; *Curran v. Arkansas*, 15 How. 304; *Bartlett v. Drew*, 57 N. Y. 587.

The shareholders of a corporation are conclusively charged with notice of the trust character which attaches to its capital stock. As to it they cannot occupy the *status* of innocent purchasers, but they are to all intents and purposes privies to the trust. When, therefore, they have in their hands any of this trust fund, they hold it *cum onere*, subject to all the equities which attach to it. Thompson's Liability of Stockholders, sec. 13; *Wood v. Dummer*, 3 Mason, 312.

It is objected, against the principles above stated, that the cases in which they were declared were where there was actual or constructive fraud or unfairness, where the corporations were insolvent, or in process of being wound up. The question naturally would arise mostly in such circumstances, but the principles enunciated are general in scope, following from the nature of the capital stock of corporations, and the relation of a stockholder to the corporation, and we know of no limitation of their application as above suggested, or reason for denial of their full applicability to the present case. Indeed, we do not understand appellants' counsel as asserting the validity of the purchase, or reduction by a corporation of its stock, where it should directly appear that it was an injury to its creditors. But it is denied that there was any such injury in this case. It is said, first, the company actually

owed no one at the time, and even if it did, as the bill admits that the shares at the time of the exchange were valued at par, and worth full purported value, it follows from the stock being worth its par value, as a matter of course, that the company was then entirely solvent, and had assets sufficient to discharge all its debts, if it had any debts, and also to pay the stock in full, — that under no other circumstances could the admission of the bill be true. There was no proof as to the condition of the company, or the value of the stock, save the testimony of the secretary of the company that at the time of the deed to Clapp the stock in the company was at par value technically, — that he did not know what the market value was, and did not know that it had any market value. The admission of the bill was the simple fact that the stock was at par. The complainant, of course, knew nothing as to what made the stock at par. But if the stock was at par, in so rating it this indebtedness to appellee could not have been taken into account. It was supposed, of course, the purchase of personal property, which had been made of appellee, would stand, and that there was no liability on account of it. If, then, the stock was just at par, not considering appellee's claim with that claim recognized, the assets would have failed to pay the indebtedness of the company by the amount of her claim, to wit, \$5653.33, and to that amount the company was insolvent.

It is insisted that this exchange of corporate property for stock was unassailable by any one, because it was an exchange of equal values — the lots being worth \$55,500, and the shares of stock being worth \$55,500, there was equal value received, and there could be harm to no one. This cannot be so, as respects creditors. Suppose all the remaining property of the company had been one other lot worth \$44,500, and the company had made a like exchange with another stockholder of that lot for the remaining 445 shares of stock, and canceled the stock, what would there have been left to pay creditors? The partial exchange which was made affected the rights of creditors in a like way, only to a less extent. It is not as if there had been an exchange made with Clapp of these lots for other real property of equal value, or as if there had been a sale to him for \$55,000 in money. In such case a substitute would have been furnished to the company to which creditors might have had recourse for payment of their debts. But the exchange of corporate property for shares of stock, and canceling the stock, furnishes no equivalent for creditors.

Although the money decree in favor of appellee was not obtained until in 1877, some time after Clapp's purchase, yet the cause of action of appellee against the company (the fraudulent purchase of the personal property from her) arose in September, 1870, which was before the purchase by Clapp, that being in January, 1874, so that at the time of Clapp's purchase appellee must be regarded as being a creditor of the company.

We can but regard the transaction in question, of the exchange of

stock for the lots and the cancellation of the stock, as a withdrawal by the stockholder of his share of the capital stock, leaving appellee's debt against the company unpaid; that the transaction was to the injury of appellee as a creditor; that the property taken by Clapp stood charged with a trust for the payment of appellee's claim; that Clapp cannot be held to be an innocent purchaser, and that the property in his hands is affected with the trust, and appellee may pursue the property and subject it to the satisfaction of her debt.

It is insisted there was such *laches* here on the part of appellee in lying by for so long a time before the purchase by Clapp, taking no steps to disaffirm the fraudulent purchase from her, as should estop her from resort to this property in the hands of Clapp. Had appellee known of the fraud upon her, or should have known of it in the exercise of reasonable diligence, there would have been force in this position; but the bill alleges that on the discovery of the fraud appellee filed her former bill to set aside the fraudulent sale, and if such was the fact no *laches* would be imputable to her. Appellee's residence in a distant State would be a circumstance which would go to account for not sooner discovering the alleged fraud. We are not prepared to say that there was such *laches* here as should disentitle to the relief sought.

It is said that appellee's decree against the company was rendered, as well as the suit commenced, after Clapp had ceased to be a member of the company, and not being a party to the suit he should not be bound by the decree against the company, and that as against him the decree should not be taken as evidence of the alleged fraudulent purchase by the company from appellee. We think Clapp took the property affected with all equities as against the company, and subject to the equity of being charged with whatever prior claim might be established as against the company, and the decree is the highest evidence of an indebtedness by the company.

It is finally urged that at least the decree is erroneous in holding the property received by Clapp to be chargeable with the whole debt, instead of a share of it, in the proportion his stock bore to the whole capital stock. As among the stockholders such a *pro rata* decree would have been equitable. But in such a case as this, of a judgment creditor, after return of an execution against the company unsatisfied, seeking in a court of equity to reach certain specific property once belonging to the company, as charged with a trust for the payment of his debt, he may pursue the property into whosoever hands he may find it, where it stands affected with the trust, and subject it to the satisfaction of his debt, and he is not obliged to attend to adjusting the equities between the stockholders. We regard the following authorities as fully warranting this, and the form of the decree in this respect: *Bartlett v. Drew*, 57 N. Y. 587; *Marsh v. Burroughs*, 1 Woods, 463; *Hatch v. Dana*, 101 U. S. 205.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CHAPTER XXIX.

MODES OF DISSOLUTION OTHER THAN BY FORFEITURE OR BY RESERVED LEGISLATIVE POWER OF REPEAL.

BOSTON GLASS MANUFACTORY *v.* LANGDON.1834. 24 *Pickering (Mass.)*, 49.¹

ASSUMPSIT on a promissory note given by the defendant to the plaintiffs. The defendant pleads in abatement, that at the time of the purchase of the writ there was not, and now is not, any such corporation established by law, called the Boston Glass Manufactory, as in and by the writ is supposed. The plaintiffs reply that there was and is such a corporation; and tender an issue; which is joined.

At the trial, before *Morton, J.*, the plaintiffs offered in evidence their act of incorporation, and showed their organization under it in 1811.

The records of the corporation were introduced by the plaintiffs, and were used and relied upon by both parties.

The defendant then introduced an indenture, dated the 27th of May, 1827, assigning all the property of the corporation to certain persons, in trust to pay, *pro ratâ*, such creditors as should become parties to the indenture. This instrument contained covenants, that the assignees might use the name of the corporation in the collection of the debts, and in the disposition of the property assigned; that the corporation would not hinder or obstruct them in the performance of these functions; and that it would make any further conveyances and assurances which might become necessary, and perform any other and further acts which might be required to enable the assignees fully to execute their trust. No provision was made for a release to the corporation by the creditors, nor for paying over to the corporation the surplus, if any, of the property assigned. The defendant also referred to all the records subsequent to 1817, and contended that the assignment of the property of the corporation, and the omission to hold annual meetings, to choose directors, and to transact business, as appears by the records and books of the corporation, supported the issue on her part and entitled her to a verdict.

¹ Argument omitted. — Ed.

But the jury were instructed, that the evidence was competent to prove the establishment and continuance of the corporation down to the present time.

The plaintiffs then claimed to have the damages assessed by the jury, if they found a verdict in their favor, and offered in evidence the note declared on. This was objected to by the defendant, because the note had been assigned. But the objection was overruled.

The defendant then offered to prove that the note was without consideration. This evidence was objected to and was excluded.

The jury found a verdict for the plaintiffs for the whole amount of the note and interest.

The defendant excepted to the decisions and instructions of the judge; and for the reasons above appearing, moved for a new trial.

Austin, for the defendant.

Sullivan, for the plaintiffs.

MORTON J. delivered the opinion of the Court.¹ The non-existence or death of the plaintiff may properly be pleaded in abatement. 1 Chitty's Pl. 482; Story's Pl. 24. But whether, as it entirely and perpetually destroys the plaintiff's right to recover, it may not also be pleaded in bar, it is not necessary to determine. *Proprietors of Monumoi v. Rogers*, 1 Mass. R. 159; *First Parish in Sutton v. Cole*, 3 Pick. 245. Whether the plea conclude in abatement or bar, the issue being found against the defendant, the judgment must be peremptory. The established rule is, that in dilatory pleas, when the issue is found against the defendant on matters of fact, the judgment must be in chief. Gould's Pl. 300; Howe's Pract. 215.

The principal question for our consideration is, whether judgment shall be rendered on the verdict. The defendants' counsel contends that the evidence introduced will not support the verdict, but that the verdict is against the evidence and the law and should be set aside.

The point which has been determined by the jury, though necessary to be submitted to them with proper instructions, is quite as much a matter of law as of fact; and we the more readily enter into the examination of it.

The legal establishment and due organization of the corporation were admitted; but it was contended that the facts disclosed showed a dissolution of it.

The elementary treatises on corporations describe four methods in which they may be dissolved. It is said that private corporations may lose their legal existence by the act of the legislature; by the death of all the members; by a forfeiture of their franchises; and by a surrender of their charters. 2 Kyd on Corp. 447; 1 Bl. Comm. 485; 2 Kent's Comm. (1st ed.) 245; Angell & Ames on Corp. 501; *Oakes v. Hill*, 14 Pick. 442. No other mode of dissolution is anywhere mentioned or alluded to.

1. In England, where the parliament is said to be omnipotent and

¹ *Shaw*, C. J., did not sit in the cause.

where in fact there is no constitutional restraint upon their action, but their own discretion and sense of right, corporations are supposed to hold their franchises at the will of the legislature. But if they possess the power to annul charters, it certainly has been rarely exercised by them. In this country, where the legislative power is carefully defined by explicit fundamental laws, by which it must be governed and beyond which it cannot go, it has become a question of some difficulty to determine the precise extent of their authority in relation to the revocation of charters granted by them. But as it is not pretended that there has been any legislative repeal of the plaintiffs' charter, it will not be useful further to discuss this branch of the subject.

2. As all the original stockholders are not deceased, the corporation cannot be dissolved for the want of members to sustain and exercise the corporate powers. Besides, this mode of dissolution cannot apply to pecuniary or business corporations. The shares, being property, pass by assignment, bequest, or descent, and must ever remain the property of some persons, who of necessity must be members of the corporation as long as it may exist.

3. Although a corporation may forfeit its charter by an abuse or misuser of its powers and franchises, yet this can only take effect upon a judgment of a competent tribunal. 2 Kent's Comm. (1st ed.) 249; *Corporation of Colchester v. Seaber*, 3 Burr. 1866; *Smith's case*, 4 Mod. 53. Whatever neglect of duty or abuse of power the corporation may have been guilty of, it is perfectly clear that they have not lost their charter by forfeiture. Until a judicial decree to this effect be passed, they will continue their corporate existence. *The King v. Amery*, 2 T. R. 515.

4. Charters are in many respects compacts between the government and the corporators. And as the former cannot deprive the latter of their franchises in violation of the compact, so the latter cannot put an end to the compact without the consent of the former. It is equally obligatory on both parties. The surrender of a charter can only be made by some formal solemn act of the corporation; and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve, that there was to form the compact. It is the acceptance which gives efficacy to the surrender. The dissolution of a corporation, it is said, extinguishes all its debts. The power of dissolving itself by its own act, would be a dangerous power, and one which cannot be supposed to exist.

But there is nothing in this case which shows an intention of the corporators to surrender or forfeit their charter, nor anything which can be construed into a surrender or forfeiture.

The possession of property is not essential to the existence of a corporation. 2 Kent's Comm. (1st ed.) 249. Its insolvency cannot, therefore, extinguish its legal existence. Nor can the assignment of all its property to pay its debts, or for any other purpose, have that effect. The instrument of assignment was not so intended, and cannot

be so construed. All its provisions look to the continuance of the corporation. It contains covenants that the assignees may use the corporate name for the collection of the debts and the disposition of the property assigned; that the corporation will not hinder or obstruct them in the performance of these functions; that it will make any further conveyances and assurances which may become necessary, and will do and perform any other and further acts which may be required to enable the assignees fully to execute their trust. The instrument which covenants for future acts, cannot be construed to take away all power of action.

The omission to choose directors clearly does not show a dissolution of the corporation. Although the proper officers may be necessary to enable the body to act, yet they are not essential to its vitality. Even the want of officers and the want of power to elect them, would not be fatal to its existence. It has a potentiality which might, by proper authority, be called into action, without affecting the identity of the corporate body. *Colchester v. Seaber*, 3 Burr. 1870.

But here in fact was no lack of officers. Although no directors had been chosen for several years, yet, by the by-laws of the corporation, the directors, though chosen for one year, were to continue in office till others were chosen in their stead.

The damages were properly assessed by the jury. The defendant having elected to try her case upon a plea in abatement, must submit to the legal consequences of that form of trial. Perhaps the Court might have assessed the damages as in case of default. But most obviously the better course was to submit the subject to a jury. In doing this the defendant could not be allowed to go into the whole defence as upon the general issue. The rule adopted at the trial was the correct one.

Judgment according to verdict.

CHAPTER XXX.

CORPORATE RECEIVERSHIP.¹

SECTION I.

Grounds for the Appointment of a Receiver.

EDWARDS v. STANDARD ROLLING STOCK SYNDICATE.

1892. *Law Reports*, [1893] 1 *Chancery*, 574.

MOTION by the plaintiffs for the appointment of a receiver of all the property and assets of the defendant company comprised in or subject to the mortgage debentures of the company, and to manage and carry on the business of the company comprised in the debentures.

The plaintiffs, *B. Edwards* and *S. W. Hadingham*, sued "on behalf of themselves and all other the holders of mortgage debentures of the defendant company." By the writ in the action, which was issued on the 16th of December, 1892, the plaintiffs claimed, as debenture holders of the company, (1.) a declaration that the mortgage debentures issued by the company, and then outstanding, constituted a first charge upon all the property of the company; (2.) to have an account taken of what was due and owing to the plaintiffs and the other debenture holders of the company under or by virtue of their debentures; (3.) to have the debentures enforced by foreclosure or sale; (4.) to have a receiver and manager of the company's property appointed.

The notice of motion was given on the 16th of December.

The plaintiffs were originally the holders of fifty debentures (the whole number issued), each for the sum of £100, and at the time of the issue of the writ they still held forty-seven of them.

By each debenture the company covenanted with the registered holder thereof for the time being that they would, on the 30th of June, 1894, pay to such registered holder the sum of £100, with interest thereon in the mean time at the rate of 6 per cent. per annum, by equal half-yearly payments on the 1st of January and the 1st of

¹ This chapter has been prepared by Prof. Williston.

July in each year. And the company did thereby charge with the payment of the said sum of £100 and interest its undertaking and all its property, real and personal, present and future, including book debts and its uncalled capital, if any, for the time being.

Each debenture was issued upon and subject to certain conditions indorsed thereon.

The material conditions for the present purpose were as follows:—

1. "This debenture is one of a series of fifty like debentures, numbered consecutively from 1 to 50 inclusive, issued by the company on the — day of —, 18—, for securing principal sums amounting to £5000, and registered in the books of the company.

2. "The said debentures of the said series so numbered shall rank *pari passu* as a first charge upon the whole of the undertaking of the company, as within mentioned, without any preference or priority one over the other.

3. "The charge created by the debentures shall be a floating security, and accordingly the company may in the course of its business, and for the purpose of carrying on the same, deal with the property hereby charged in such manner as the company shall think fit, and may lease the same, and may pay and receive money, and declare and pay dividends out of profits. But the powers hereby given shall cease if default is made in the payment of any principal moneys secured by any of the series of debentures at the time when the same become payable or if default is made in the payment of any interest payable on any of the said series of debentures at the time fixed for the payment thereof, or if an order of some Court of competent jurisdiction is made, or a special or extraordinary resolution is passed, for winding up the company.

4. "The debentures shall constitute and be a first charge on the undertaking and property of the company, and nothing herein contained shall be taken to authorize the creation of any mortgage or charge on the undertaking, or any of the property for the time being of the company in priority to the charge hereby created."

In support of the motion the plaintiffs made an affidavit, in which they said that several actions brought by creditors against the company were pending, and that in one of those actions judgment had been recovered against the company by one *Roberts*, and execution had, on the 12th of December, been levied by the sheriff on goods and chattels of the company comprised in the debentures. The plaintiffs had served notice on the sheriff, informing him that the goods and chattels which he had seized were charged by the debentures of the company held by the plaintiffs; but, notwithstanding the notice, the plaintiffs had been informed and they believed that the sheriff intended to proceed to a sale of the goods which he had seized, unless he was restrained by the court.

The company appeared by counsel and consented to the motion.

Macnaghten, for the plaintiffs:—

Though there is nothing yet due in respect of the debentures, yet the court will protect the plaintiffs' security by the appointment of a receiver: *McMahon v. North Kent Ironworks Company*, [1891] 2 Ch. 148.

[NORTH, J.: — In *Legg v. Mathieson*, 2 Giff. 71, the plaintiffs were in the position of ordinary mortgagees. Their security was not a "floating" one, as in the present case. I feel a difficulty in interfering with the right of ordinary creditors to levy execution.]

In *Legg v. Mathieson*, 2 Giff. 71, the plaintiffs' charge was really upon floating assets, upon the undertaking of the company from time to time. It was not like an ordinary mortgage of definite property, such as a house. Though a security upon floating assets is not what may be called "crystallized" till the debenture holders take steps to enforce it, still it is a subsisting charge upon the assets: *Wildy v. Mid-Hants Railway Company*, 16 W. R. 409; *In re Standard Manufacturing Company*, [1891] 1 Ch. 627.

Oswald, for the company, consented to the motion.

NORTH, J.: —

I must follow *Wildy v. Mid-Hants Railway Company*, in which, at the instance of debenture holders, who were mortgagees of the undertaking of the company, Lord Chancellor *Chelmsford* held that a receiver of the undertaking could be appointed, though the mortgage money had not become due when the bill was filed.

Macnaghten: —

I ask also that the receiver may be appointed manager of the company's business. *Makins v. Percy Ibotson and Sons*, *Ibid.* 133, is an authority for making the appointment.

NORTH, J.: —

I will follow that case, though, as Mr. Justice *Kay* said there, I make the appointment with great hesitation.¹

[In this connection, see the case of *Pond v. Framingham & Lowell R. R. Co.*, *ante*, p. 1029.]

BREWER, J., IN HOLLINS v. BRIERFIELD COAL AND IRON COMPANY.

1893. 150 *United States*, 371, 378.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

The plaintiffs were simple contract creditors of the company; their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or otherwise. It is the settled law of this court that such creditors cannot come into a court of equity to

¹ Followed in *Re Victoria Steamboat Line*, [1897] 1 Ch. 158. — ED.

obtain the seizure of the property of their debtor, and its application to the satisfaction of their claims; and this notwithstanding a statute of the State may authorize such a proceeding in the courts of the State. The line of demarcation between equitable and legal remedies in the Federal courts cannot be obliterated by state legislation. *Scott v. Neely*, 140 U. S. 106; *Cates v. Allen*, 149 U. S. 451. Nor is it otherwise in case the debtor is a corporation, and an unpaid stock subscription is sought to be reached. *National Tube Works Company v. Ballou*, 146 U. S. 517; *Swan Land & Cattle Company v. Frank*, 148 U. S. 603, 612. Nor is this rule changed by the fact that the suit is brought in a court in which at the time is pending another suit for the foreclosure of a mortgage or trust deed upon the property of the debtor. Doubtless in such foreclosure suit the simple contract creditor can intervene, and if he has any equities in respect to the property, whether prior or subsequent to those of the plaintiff, can secure their determination and protection; and here, by the express language of the bill filed by the trustee, all claimants and creditors were invited to present their claims and have them adjudicated. These plaintiffs did not intervene, though, as shown by the allegations of their bill, they knew of the existence of the foreclosure suit; neither did they apply for a consolidation of the two suits. On the contrary, the whole drift and scope of their suit was adverse to that brought by the trustee, and in antagonism to the rights claimed by him. They obviously intended to keep away from that suit, and maintain, if possible, an independent proceeding to have the property of the debtor applied to the satisfaction of their claims. But this, as has been decided in the cases cited, cannot be done. The excuse suggested, that the rule which forbids in a suit to foreclose a mortgage the litigation of a title adverse to that of the mortgagor prevented them from intervening, is not sound. Their rights, like those of the trustee and the bondholders, were derived from the corporation defendant. Each claimed under it, and the validity and amount of such claims were matters properly and ordinarily considered and determined in a foreclosure suit. It is true the corporation might admit the validity of any or all of the claims, and then the validity could only be a subject of inquiry as between the claimants for the purpose of determining the matter of priority, but to that extent, at least, both validity and amount are always open to contest and determination.

It is urged, however, that this court has sustained the validity of proceedings and decrees in suits of this nature, in which it appeared that the plaintiffs had not exhausted their remedies at law, and the cases of *Sage v. Memphis & Little Rock Railroad*, 125 U. S. 361, and *Mellen v. Moline Iron Works*, 131 U. S. 352, are cited as illustrations. But passing by other matters disclosed by the facts of those cases, it will be noticed that in neither of them was the objection made at the outset, and when action on the part of the court was invoked. Defences existing in equity suits may be waived, just as they may in law

actions, and when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defences existed which, if presented, would have resulted in a decree of dismissal. Take the present case as an illustration: suppose the corporation and other defendants had made no defence, and, without expressly consenting, had made no objection to the appointment of a receiver, and the subsequent distribution of the assets of the corporation among its creditors; it cannot be doubted that a final decree, providing for a settlement of the affairs of the corporation and a distribution among creditors could not have been challenged on the ground of a want of jurisdiction in the court, and that notwithstanding it appeared upon the face of the bill that the plaintiffs were simple contract creditors; because the administration of the assets of an insolvent corporation is within the functions of a court of equity, and the parties being before the court, it has power to proceed with such administration. If there was a defence existing to the bills as framed, an objection to the right of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted, it was a defence and objection which must be made *in limine*, and does not of itself oust the court of jurisdiction. This doctrine has been recognized not merely in the cases cited, but also in those of *Reynes v. Dumont*, 130 U. S. 354; *Kilbourne v. Sunderland*, 130 U. S. 505; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530. None of these cases question the proposition that if the objection is seasonably presented it will be effective

MERCANTILE TRUST COMPANY v. MISSOURI, KANSAS
& TEXAS RAILWAY COMPANY, *et al.*

1888. 36 *Federal Reporter*, 221.

BREWER, J. (*orally*).

This bill was filed a few days after default in the payment of interest, June last. And the first question — a vital question — is whether this suit was prematurely brought; for, being a suit to foreclose, and not one for the preservation of the property, if prematurely brought, it would finally have to be dismissed, and a receiver ought not to be appointed *ad interim*. The ground upon which the claim rests is the fact that this mortgage or deed of trust requires a six months' delay after the default before certain proceedings — and foreclosure, it is claimed, is one — are permissible. The second article provides for entry by the trustee, but by its terms such entry cannot be till six

months after default and demand of payment. The third article likewise authorizes sale by advertisement, and that is equally limited. At the close of that article follows this paragraph: "This provision is cumulative to the ordinary remedies by foreclosure in the courts; and the trustee herein, or its successor or successors in this trust, upon default being made as aforesaid, may, at its discretion, and upon the written request of the bondholders of a majority in value of said bonds then unpaid, shall," etc.

Now, the contention is that those words, "upon default being made as aforesaid," being in the last part of this article, by fair construction refer back to the entire provision in the first part in respect to default, and include both the happening and continuance of the default. The argument rests merely on the force of the last two words, "as aforesaid," and is forcibly put by counsel. That is the real question in the case, for, if this last paragraph in article 3 were omitted, the decision of the Supreme Court in the case of *Railroad Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. Rep. 10, would leave no question. In that case, as appears from the statement, there were in the mortgage stipulations providing for entry and sale by advertisement six months after default. The validity of those provisions was recognized by the Supreme Court; but it held that, notwithstanding this, if by other stipulations in the mortgage it was a security for the payment of interest as it semi-annually accrued, as well as of the principal, the trustee, or, on his failure to act, any bondholder, might, on the non-payment of interest, bring suit and foreclose. Turning to this mortgage, I find the same provision. It is given as security for the payment of the interest as well as of the principal. By article 2 possession is secured to the railroad company, — the mortgagor, — until default be made in the payment of principal or interest. Unquestionably the right of action at law on the coupon exists. Unquestionably, if articles 3 and 4 were omitted, the mere fact that this property was by the mortgage pledged as security for the payment of coupons would permit the coupon-holder to come into a court of equity and enforce that pledge.

It is insisted that these articles, not excluding the jurisdiction of courts of law, not debarring a party from his right of action upon the coupons, deprive him of a present right of action upon the mortgage by a suit in equity to enforce that pledge. Language requiring such construction should be clear. If the parties — and it is to be assumed that they who drafted this mortgage or deed of trust were competent for that business — contemplated not merely that no entry should be made, no sale under the power until the lapse of six months after default, but also that the coupon-holder, having his right of action at law on the coupons, should not have a right of action in equity, such purpose, it seems to me, would naturally have been expressed in clear and unmistakable language, and not in that of doubtful interpretation. In every other place that I have been able to find in this mort-

gage, where a right rests upon the continuance of the default, and that appears in articles prior and subsequent to this paragraph, the language is express: "In case default shall be made in payment of interest, and shall continue for six months." Now, if it was intended to limit the jurisdiction of a court of equity until after the lapse of six months from the time of the happening of the default, it seems to me that the draughtsman would have placed the stipulation therefor in a separate article, and would have made its meaning so plain that there would be no question. We all know in the preparation of instruments how common the expressions "said" or "as aforesaid" are used without any clear or definite intent. They are words which we use, not thoughtlessly, but carelessly; and although they are used here, yet as it is also found that the continuance of the default is not mentioned, it seems to me it is giving to those words an enlarged and unnecessary force to hold that they broaden the expression "making default" into "making and continuing default," as expressed in the first part of the article. Nor is this a mere resting upon the language of the paragraph. It opens with the distinct announcement that these special provisions in respect to entry and sale under a power are cumulative to the ordinary remedies by foreclosure; contemplating, in its opening words, a proceeding in a court of equity in any case of default. Nor is it strange that there should be special limitations upon the two matters provided in articles 2 and 3, and none about proceedings in a court of equity. An entry is a speedy remedy; it runs to the *corpus* of the property; it takes instant hold of it, and takes it away from the mortgagor. The parties may well have contemplated that, if there was a temporary default, there should be no such speedy interference and summary seizure by the mortgagee. So a sale by advertisement—in this case an advertisement of eight weeks—is speedy and summary; and if, upon the happening of a temporary default, the trustee at the instance of a single coupon-holder should thus advertise and sell the property, it is obvious that great wrong might be done; and six months' delay is a very natural provision. But proceedings in a court of equity are not thus hasty. They are not within the control of any coupon-holder or any trustee. They stand advanced or delayed, as in the judgment of the chancellor the best interests of the property require. If it appears in any case that a coupon-holder, from improper motives, or from a simple greed for his money, is willing to wreck a large property, and comes into a court of equity upon the happening of a temporary default, it goes without saying that the chancellor holds his hands until it becomes apparent that the property as a whole cannot be saved to its owners. Inasmuch as these proceedings stand upon the discretion of a court of equity, it is not strange that the parties were willing to leave to the bondholders and coupon-holders an open door into such a court. They left an open door into a court at law, and there is at least equal chance, if not greater, that the freer motions of a court of equity will

afford as full protection to the mortgagor. These considerations, perhaps not very clearly expressed, are the reasons which have led me to hold that this case is within the rule laid down in 106 U. S. 47, 1 Sup. Ct. Rep. 10, *supra*, and that this suit is not prematurely brought.

That only passes from one trouble to another. The right to foreclose does not carry with it the right to a receiver. There are many considerations that bear upon that question. Every case, of course, stands on its own merits. It is difficult to formulate any rule which, briefly stated, will control in all cases. It should appear that there is some danger to the property; that its protection, its preservation, the interests of the various holders, require possession by the court before a receiver should be appointed. It does not go as a matter of course; and yet it is not a matter that a court can refuse simply because it is an annoyance. If, looking at the situation of the litigating parties, and of the property, with the prospects of the future, it should appear to a court that they would be benefited, that their interests would be suberved by the appointment of a receiver, why, no court—although a matter resting, as it is said, in its discretion—could refuse to make the appointment.

I shall not go over all the matters that have been discussed. I want to suggest some things that have impressed me. Of course, so far as the adequacy of this security, so far as the solvency of the corporation is concerned, so far as the question whether this is a temporary embarrassment or permanent, these facts stand out confessed, indisputable at least. It has ceased to pay interest on its mortgages; one, two, three, and four have defaulted. The amount of that interest runs considerably over a million; and the payment of interest on the large mortgage comes due in two months. The business of this year from the 1st of June to the 1st of September, as shown by the statistics, is decreasing; from the 1st of September to the 14th there was a slight increase. The road is not along the main highway of travel eastward and westward. It is one running north and south, along which business to-day is, as we all in the west know, comparatively in its inception. It crosses for two or three hundred miles a territory which is occupied by Indians, and furnishes little business. It has been for years the only road that traversed that territory. Within the last year or two, two more roads have crossed, and a third is seeking to cross. Competition between these roads traversing that territory, and bringing Texas and its commerce into relations with Kansas, Missouri, and the north, as a matter of necessity, it seems to me, must tend against the increase of earnings.

The report of the committee—a committee appointed by the company—tends to show that the payment of interest, which has been made prior to this year, has been largely at the expense of the proper repairs and improvement of the road. I do not mean to say that all

this is absolutely conclusive on the question, but these are matters which have forced themselves upon my mind. While it is true that — the road paying no interest since the 1st of June — the revenues have diminished by four or five hundred thousand, the amount which is due as claimed to the Missouri Pacific for advancements, yet the earnings must increase largely before these back interests can be met, to say nothing of future interests speedily maturing. That a road thus situated, some 1600 miles in length, is burdened with a mortgage of \$28,000 a mile, carries with it, to my mind, very strong evidence that there is no reasonable probability of its ever being kept in proper condition when paying the interest on such a debt. The only way in which any mortgagee can get possession of the rents and profits is through a receiver. The law of Kansas forbids any other remedy upon a mortgage than a foreclosure in the court. No possession could be had under article 2. No sale could be made under the power attempted to be given in article 3. The sole remedy is by foreclosure. Unless a receiver is appointed, the rents and profits pass into the possession of the mortgagor, to be expended by it according to its best judgment. That is affirmed by the three cases of *Railroad Co. v. Cowdrey*, 11 Wall. 463; *Gilman v. Telegraph Co.*, 91 U. S. 603; and *Dow v. Railway Co.*, 124 U. S. 652, 8 Sup. Ct. Rep. 673. Not merely that; suppose this foreclosure proceeding should pass to a decree, and the defendant appeal, its bond on appeal would be no protection to the mortgagee in respect to the rents and profits. That is settled in the case of *Kountze v. Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. Rep. 911. So that this litigation might proceed and continue for a long time in this and in the Supreme Court, without ever giving the mortgagee a hold upon the profits unless a receiver is appointed. This mortgage is a second mortgage on a large part of the road. As such mortgagee it has, more than any other party, an interest in reaching after and securing those rents and profits. The first mortgagee, having a limited amount upon the part of the road upon which its mortgage rests, may feel safe; for his principal and interest must be paid before the second mortgagee can come in. So that the complainant has a special interest in reaching for, and as soon as possible obtaining possession of, the surplus earnings. More than that, it is perfectly obvious that the real owners of this property are not in harmony. The stock controls the road, but with the \$45,000,000 of bonded indebtedness — \$28,000 a mile — on the road, the real owners are the bondholders; and that they are not agreed in respect to what shall be done with this property is, I think, confessed. For years the property was in the management of a certain interest. That interest was removed last spring from the control. It was not removed so long as the road was apparently prosperous, and paying its coupons. When adversity threatened it, as was natural, those who held interests in the road were not satisfied with the management, and sought

control. If these gentlemen now in control could make it a promptly paying road within a reasonable time, why, it might be expected, according to the laws of human nature, that they would remain in control; but we all know how, when one fails and continues to fail, all who are interested are prone to lay the responsibility upon him, and to seek a change. And there is no certainty that another year different interests might not combine, and so the road be subject to different control. At any rate, it is very evident that there is no harmony — no unity of purpose — between those who are the real owners. Now, if it were a partnership, and it was apparent to a court that the partners had got into a quarrel, the very fact of their quarrel would be a strong reason why it should take possession of the property. Of course that consideration has not so much force in respect to a corporation, but it strengthens other considerations. Those are the principal reasons that have operated on my mind, — the default in interest, the fact that the rents and profits can only be appropriated in this way, the decreasing revenues, the recent construction of parallel roads, the fact that it passes through such a portion of territory, so unprofitable, the condition of the road as developed by this report of the committee, and the conflict between various parties having real and substantial interests. Much as I should be glad to be free from the annoyance of a receivership, — and I know something about it, — it seems to me I should be delinquent if I refused this application. There are some minor matters that I might refer to, yet, perhaps, they would not strengthen anything I have said.

There is one matter, however, I must notice, — the suggestion of the Missouri Pacific that it could defeat this application, and that it was here in the attitude of a party to consent upon the condition that the balance due it was properly protected, and that no order should be made in reference to the possession by the receiver of the International & Great Northern Railroad or its stock. If I understood the situation to be that this application depended on the consent of the lessee, the Missouri Pacific, and its consent was tendered upon any such condition as that, there would be no receiver appointed. The rights of the lessee, as I look upon these two instruments, are subordinate to the rights of the mortgagee, and it is the mortgagee whose application is sustained, and all parties having claims of any kind must depend upon the inherent equity of their claims. So far as the stock in the International & Great Northern is concerned, as well as some other assets, they are, as stated, now under pledge, and in the possession of this complainant; perhaps, also, attached by certain garnishment proceedings. I think the interests of the mortgagor require that there should go an order upon the complainant not to part with that possession, except in obedience, of course, to the process of the courts in New York, until the ultimate rights of the par-

ties are determined. As to the possession of the International & Great Northern, I doubt whether it is within the province of this court to determine that question. It is a separate road, whose stock, I believe, in part has become the property of the Missouri, Kansas & Texas corporation; but it is wholly situated in another circuit, and certainly at present I am not prepared to say that this court would have a right to determine whether a receiver of the Missouri, Kansas & Texas should take possession of that separate road. It may be that is a question which will have to be determined by the judge of that circuit. At any rate, I should not at present, without further consideration, perhaps consultation with Judge PARDEE, feel like making any order in respect to it. It is a matter in which I shall be glad to hear counsel hereafter upon, and perhaps try and arrange with Judge PARDEE jointly to hear them as soon as practical. That, I think, is about all I have to say in reference to this matter, except as to the receiver. If parties agree upon a receiver, of course I shall appoint whoever you agree upon. If not, I will hear any suggestions from any of the parties in interest, and reasons for or against any person to be named by one side or the other.

DAVIS *et al.* v. THE UNITED STATES ELECTRIC POWER
AND LIGHT COMPANY OF BALTIMORE *et al.*

1893. 77 *Maryland*, 35.

PAGE, J., delivered the opinion of the court.

The bill in this case was filed by certain stockholders of the United States Electric Power and Light Company of Baltimore City, on behalf of themselves, and of other stockholders of said company, in like situation with themselves. This company was incorporated under the general law of the State of Maryland, for the purpose of manufacturing electricity for illuminating purposes, and for use as a power, and for all other purposes to which electricity or magnetism may be applied, and also for buying and selling dynamo electric machines for the manufacture of electricity, and all other machines and inventions connected therewith throughout the State. For a number of years it has been engaged in the business for which it was incorporated in the City of Baltimore, and, at the time of the institution of these proceedings, was furnishing light and power to about one hundred and seventy-five customers. Its capital stock consists of five thousand shares, of the par value of \$100 each, of which one thousand are unissued, twenty-five hundred and five are owned by the Brush Electric Company of Baltimore City, one hundred and ninety-six by Augustus G.

Davis, one of the complainants, and of the remaining shares various amounts are held by the other complainants.

The Brush Electric Company of Baltimore City was also incorporated under the laws of the State of Maryland, for the purpose of conducting the same business, and, prior to the year 1886, was a rival and a competitor of the United States Company in the City of Baltimore. To prevent the ruinous rate-cutting and under-bidding, which were the consequences of this rivalry, the Brush Company, in that year, became the purchaser of a majority of the stock of the United States Company. The affairs of the latter company seem to have been conducted to the satisfaction of both the companies, until November of 1891, when the alleged troubles began, which form the subjects of complaint. The bill alleges, that on that day an election was held by the stockholders of the United States Company, at which was chosen a board of directors, a majority of whom were persons principally interested in the affairs of the Brush Company, appointed by that company to carry out a policy dictated by the Brush Company as follows, viz., First, to conduct the affairs of the United States Company "in the interest of, and in order to feed, the Brush Electric Company, at the expense of the stockholders, not interested in the said Brush Electric Company; second, to permit it to earn only an income sufficient to provide for its running expenses; and third, to close up the affairs of the United States Company, and dispense with its operations, whenever it shall be found to be to the interest of the Brush Company." Many acts, alleged to be in furtherance of this policy, are set out in the bill. As we shall consider these later on, they need not be more particularly referred to at this point. The complainants also charge, that, although the value of the shares of stock of the United States Company has been greatly lessened by these fraudulent doings, nevertheless their value has not yet been wholly destroyed, but will speedily be, unless control of the corporation be promptly withdrawn from those who constitute a majority of the board of directors; and that they are without remedy save by the "immediate appointment of a receiver, who can remove the conduct of affairs" of the company from the control of these directors, and conduct the same under the direction of the court, until its affairs can be finally wound up; that its business can no longer be profitably conducted, and it is for the interest of the stockholders that it should be wound up, and its assets sold and disposed of according to the rights and equities of shareholders and creditors, and for that purpose pray that a receiver may be appointed.

The answer of the Brush Company, which is adopted by all the other defendants (except the two Safe Deposit Companies), denies the alleged policy of the directors of the United States Company, and affirms that, in so far as the officers and members of the Brush Company have taken part in the affairs of that company, "they have been governed not only by the desire to give value to this defendant's large

interest in said company, but to deal fairly and honestly with all concerned." It either denies or explains the several acts attributed by the bill to the Brush Company, and denies all fraud, or that the value of the shares of the United States Company has been lessened by any act of the Brush Company, or of its officers and members, and demands full proof of all the allegations in the bill not specifically admitted.

There is no question raised as to the power of the Brush Company to purchase and hold the stock of the United States Company. Since the case of *Booth et al. v. Robinson et al.*, 55 Md. 433, it is settled in this State that "one corporation may deal in the shares of another without express authority so to do, unless where expressly prohibited, or the nature of its business renders it improper so to deal." But it was contended at the argument that the Brush Company, occupying the relation which it does to the public, had no right to participate at all in the election of directors. But we think this contention cannot be maintained. If it be conceded that the company can lawfully purchase and hold the stock, then, in the absence of any restriction contained in the charter, it must follow, as an incident to the ownership of the stock, as well as by the express terms of the statute, that it shall have a vote at all meetings of stockholders for each share of stock it may hold. *Mottu et al. v. Primrose*, 23 Md. 501.

In that case the court not only lays down this rule, but proceeds: "While the minority of the stockholders are entitled to protection against the fraudulent or illegal action of the majority, that protection is not to be had by denying to the majority their right annually to elect the Board of Managers."

The gravamen of the complaint made by the bill is, that the Brush Company, having obtained control of the management of the United States Company, is using its power to make that company subservient to its own interest, to use it as a feeder, and finally utterly to destroy it, whenever it shall be to their profit so to do. This, as was said in *Booth v. Robinson (supra)*, would be a fraud of the most flagrant character. It would subject the corporation at whose instance the scheme was devised and executed, not only to a civil liability for the injury done, but also to the penalties of misuser or abuser of its franchises; and in such a case "courts can neither be too emphatic in condemning the act, nor too ready to afford the strongest remedy allowed by law for the prevention or redress of the wrong." In this case, the relief prayed for must be granted, if at all, in the exercise of the ordinary powers of a court of equity. The dissolution of the company is not asked for; as indeed it could not be, without a compliance with the provisions of the Code having reference to that subject. The principles applicable to the appointment of receivers have been definitely settled in Maryland. The power is a discretionary one, to be exercised with great circumspection, and only in cases where there is fraud or spoliation, or imminent danger of the loss of the property, if the immediate possession should not be taken by the court; and these

facts must be clearly proved. But where these conditions have been fully met, courts do not hesitate to appoint receivers over the property of corporations, for the benefit of all concerned during the controversy. *Clark et al. v. Ridgely et al.*, 1 Md. Ch. Dec. 70; *Blondheim et al. v. Moore*, 11 Md. 374; *State v. Northern Central Railway Co.*, 18 Md. 215; *Voshell & Heaton v. Hymson et al.*, 26 Md. 83.

It is not here alleged that the United States Company is at present insolvent, or that its property is being wasted, but that the directors, at the instance and for the benefit of the Brush Company, have adopted a fraudulent policy, and are carrying it out by the fraudulent acts set out in the bill, and that if this policy be persisted in, ruin will soon overtake that company, and its stockholders will suffer the loss of the value of their stock. If these allegations are clearly proved, the court would be enabled to decide a gross fraud was being perpetrated, and it would have ample jurisdiction to take the affairs of the company from the control of the directors, and place them in the hands of a receiver, to be administered under the direction of the court, according to the principles of law and equity. Before proceeding, however, to examine the evidence, it may be well to advert to the fact that "upon the question of the fraudulent intent or design charged," though it be true that there may be persons in the board of directors of the United States Company who are interested in the affairs of the Brush Company, this circumstance alone, "while it should subject their conduct to rigid scrutiny by the court, does not afford ground of presumption against the legality and fairness of the dealings and transactions between the two companies." They were the chosen agents of the United States Company, and "to be successful in any attempt to impeach the validity of their acts," with a view to making them or the rival corporation responsible, "there must be distinct charges of misconduct, fully supported by proof." *Booth v. Robinson (supra)*, and authorities there cited.

[The court then examined the evidence in order to determine whether the charge of fraud made by the bill was sustained by the proof, and, deciding that the allegations of fraud were not sustained by such clear proof as to justify the court in granting the prayer of the bill, affirmed the decree of the court below dismissing the bill.]

BEASLEY, C. J., IN THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY *v.* THE ERIE RAILWAY COMPANY.

1871. 21 *New Jersey Equity*, 298, 302.

THE CHIEF JUSTICE. . . . The next question presented by these proceedings is one of much importance. It is that which relates to

the relative rights of these parties to the use of the Bergen tunnel. With respect to this subject the complainants contend that they have acquired their rights from the contract of November 1st, 1859, while the defendants controvert this, and allege that whatever rights the complainants possess, are conferred by the acts of the 4th and 11th of March, 1858. It will be necessary, therefore, to consider briefly both these sources of title. There is, however, a preliminary objection that was started on the argument which must first receive attention. It was insisted that over a matter of this kind this court had no jurisdiction. The bill asks that, if deemed necessary, regulations should be established by this court controlling the use by these companies of this tunnel, and that a receiver should be appointed to oversee the execution of such regulations; and it was the existence of this power which was denied on the side of the defendants. I have examined the cases cited, but have not found that any of them sustain the objection. These authorities go no further than to say, that a receiver will not be appointed to supersede permanently the managers of a railway and to take charge of the entire affairs of the road. The doctrine has not been extended beyond this, and to this extent it is sanctioned by the cases of *Russell v. East Anglican Railway Company*, 3 Mac. & G. 125, and *Fripp v. The Chard Railway Co.*, 11 Hare, 254. These decisions rest on the practical difficulty the court would encounter in any endeavor to conduct, through its officers, the business of a great railway. But because such a function is difficult, it does not follow that it is either difficult or improper for the court to control two or more companies in the enjoyment of property, or a franchise which is held in common, or in which there is a right to a common use. I find nothing in these cases just referred to, nor in any other, which forbids the exercise of such a power as this latter one; but, on the contrary, there are authorities of decided weight that have the opposite tendency. Where two railway companies had agreed to use a railway station jointly, no doubt seems to have been entertained, in *The Shrewsbury Railway Co. v. The Chester Railway Co.*, 14 L. T. 217-433, that the Court of Chancery had power to prescribe rules for the use of such station, and to appoint a receiver. See, also, the case of *The Midland Railway Co. v. Ambergate Railway Co.*, 10 Hare, 359. In the case before me these parties possess a community of interest in this property. They are tenants in common of an easement, and if this court cannot protect the one against the injustice of the other, the party whose rights are invaded is clearly without any adequate remedy; for it is certain that either of these companies, thus situated, can so act with respect to the common easement as to render it worthless to the other, and thus bring upon the latter incalculable mischief. The general cognizance of equity in cases of this kind, where property is enjoyed in common, will not, it is presumed, be disputed by any one, and I can perceive no reason why this power should not exist where two railroads are such tenants in common, as well as in other cases. In truth,

as these companies, although technically private corporations, are in some measure public agents, there exists in such cases as the present an additional reason why a judicial control should be extended as far as possible over their conduct towards each other. I have no doubt as to the jurisdiction of this court over this subject, and shall not scruple, therefore, to exercise it to the fullest extent that the circumstances of the case may now, or at any time hereafter, appear to require.

HUTCHINSON *et al.* v. AMERICAN PALACE CAR COMPANY.

1900. 104 *Federal Reporter*, 182.

PUTNAM, Circuit Judge. This bill was filed by complainants, representing a minority interest in the stock of the respondent, and the matter now under consideration is an interlocutory application for the appointment of a receiver of the assets of the corporation pending litigation in this suit. So far as this opinion relates to matters of general practice in this district in regard to receiverships until formal adjudication with reference thereto, it has been deemed advisable that the profession should be advised concerning them, and the court is authorized to say that the learned district judge for this district expresses himself in harmony therewith.

There are some special objections of a jurisdictional character brought to the attention of the court which involve much doubt. If the points had been fully settled, and the propositions of law in reference thereto were clear, the court would feel compelled to dispose of them; and if, also, they were of such a character as would involve a dismissal of the bill, the court would deny the petition for a receiver without investigating its merits. In this respect the principle is exactly the same as that stated in *Ladd v. Oxnard* (C. C.) 75 Fed. 793, 729. The court, however, seems to be required to notice one objection raised by the respondent. This is the contention that, as the corporation has no assets in the district of Maine, the proper jurisdiction in which to apply for a receiver is New Jersey, where is to be found its property, if it has any. It is true that every state is entitled to take control, according to its own local rules, of property lying within it, and this independently of the question of domicile; so that, under exceptional circumstances, there is no doubt that a local tribunal may properly constitute a receivership of assets actually within its jurisdiction, independently of any question of domicile. Nevertheless, where the purpose is to wind up a corporation, or a joint-stock association, or a co-partnership, on account of alleged insolvency or fraudulent transactions, or where it is desired to obtain a

general receivership, as this expression is commonly understood, initial proceedings should be at the place of domicile, and the other receivership should be ancillary thereto. This question was incidentally before the presiding judge in an unreported case in the district of Massachusetts, and the court refused to constitute a receivership of assets within the State of Massachusetts belonging to a corporation created by the laws of New Jersey, until application had been made to the United States Circuit Court for the district of New Jersey for the appointment of a general receiver.

On the filing of this petition for the appointment of a receiver the court ordered notice to the corporation, the only respondent named in the prayer for a subpoena, and also, on inquiry as to the probable residences of the principal stockholders and creditors of the corporation, directed that notice of the pendency of the application be given by publication in newspapers of suitable circulation in their localities. An interlocutory receivership of a corporation ought not to be granted, except in very extreme emergencies, unless after public notice, so that creditors and shareholders generally may intervene, and be heard on the application, if they desire. Receiverships are too often sought in order to accomplish under color of judicial process what is prohibited by the common law and by the statutes against fraudulent conveyances; that is to say, for the purpose of delaying creditors. Moreover, the proceeding is so much of the nature of one *in rem* that notice of its pendency should, so far as practicable, be given to all concerned. This practice creates no difficulty, because it is now clearly settled that the jurisdiction of the court in which a bill is filed of such a character as to justify the appointment of an interlocutory receiver attaches to all the assets to which the bill relates from the time of its filing. *Farmers' Loan & Trust Co. v. Lake Street El. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. Moreover, in cases of emergency, it is feasible to appoint the marshal a temporary custodian, with directions not to interfere with the usual operations of the corporation; thus securing the actual possession by the hand of the court in addition to the theoretical possession which the filing of the bill gives it, and at the same time leaving the court in a position to rid itself of the property without the complications which arise from the appointing and discharging of a receiver, no matter how short the time the receivership continues. The spirit of the common law requires that judicial action should be taken in open court on issue between the parties, or after an opportunity for such issue; and a regard for its traditions will not only insure the rights of litigants, but will also protect from the unjust criticisms so often made, and, what is of more importance, will secure the courts themselves against hasty and ill-considered action.

This case brings to the court three essential conditions, compliance with which is necessary to justify the appointment of a receiver as now asked for: First, that the case be fairly within the jurisdiction of

the court, having in view both the limited jurisdiction of federal tribunals and the true nature of proceedings in equity; second, that some proper final relief in equity be asked for in the bill which will justify the court in proceeding with the case; and, third, that the circumstances calling for a receiver be of a clear and urgent character.

The first and second conditions, of course, run into each other. It is occasionally said, on an application for a receivership, that all the parties in interest have agreed. This does not relieve the court from looking at the question of jurisdiction, and especially from inquiring whether the application for the receivership is really with the view of obtaining final relief, or merely for the purpose of securing a receivership for the mere sake of the receivership. It is true that, when the subject-matter is of itself of an equitable nature, certain conditions which might be availed of to defeat jurisdiction may be waived. *Hollins v. Iron Co.*, 150 U. S. 371, 380, 14 Sup. Ct. 127, 37 L. Ed. 1113. This, however, cannot go to the extent of justifying the court in appointing a receiver merely because all the parties in interest agree thereto. Not only does this not justify the court in taking jurisdiction where it ought not to, but it requires it to say to the parties that, if they are agreed, they are capable of making amicable adjustments or arrangements without its assistance, so that, therefore, there is no occasion for relief in equity. But, so far as the case at bar is concerned, this topic is of special importance, because the bill does not properly point out any suitable final relief, and on the presentation of the case at bar the counsel for the complainants were not able to state what final relief the complainants desire. The bill contains no prayer for special relief. It does contain a prayer for general relief, but the frame of the bill is such that it is impossible for the court to perceive, on the present hearing, what relief the complainants could properly ask for, or what they intended to ask for. On this matter being opened by the court during the hearing, it was plain to be seen, from the statement of the counsel for the complainants, that in filing the bill they had no clear purpose for final relief, and that they desired the appointment of a receiver only in order that the receiver might become a party respondent in certain litigation in New Jersey. This is the litigation in which Judge Kirkpatrick rendered the opinion found in *Eldred v. Car Co. (C. C.)* 96 Fed. 59, to which reference may well be had for the purpose of explaining the nature of the controversy pending in New Jersey, and the results which the complainants, the minority stockholders, desire to accomplish. It appears that, after Judge Kirkpatrick rendered the opinion referred to, the present respondent, acting through its officers, under direction of a vote of the large majority of its stockholders, directed its counsel to object that the United States Circuit Court for the district of New Jersey had no jurisdiction over it; and thereupon the court was required so to hold, and the respondent corporation was dismissed from the New Jersey litigation. In view of the facts that

the litigation in New Jersey is in equity, and therefore cannot proceed unless all parties in interest, among which is the respondent corporation, are parties to the record, and that, also, the opinion of Judge Kirkpatrick shows *prima facie* that that litigation involves serious questions and substantial interests, a court having proper jurisdiction might take action in that direction, either directly by acting upon the respondent corporation itself, or indirectly by appointing some person to represent it, provided the parties complainant showed that they had a substantial grievance. But as this bill asks no final relief, and was not filed for that purpose, it is beyond the power of this court to grant the pending motion, even if the court could perceive that a receiver appointed by an interlocutory decree could obtain a standing in the New Jersey litigation. It does not follow that, because this court denies the relief now asked for, relief could not be obtained on proceedings by mandamus, either in the federal courts, or the state courts having jurisdiction over the corporation, or by a bill filed showing that the complainants have a substantial interest to be promoted, and in which the relief asked for should be the appointment of a trustee, who should appear in the New Jersey litigation in the name of the corporation, with authority to represent it, on the principle adopted by the Supreme Court of New Hampshire in the well-considered case of *Pearson v. Railroad Corp.*, 62 N. H. 537, 550. Such a bill, however, if one can be maintained, would be a bill framed for the particular purpose of the appointment of a trustee, and asking for such appointment as a matter of final relief, thus enabling the court to pass on the question intelligently on formal proofs and proper issues.

Some litigation in which the corporation is alleged to be concerned is said to be pending in Massachusetts, but the observations which we have made in reference to the New Jersey litigation dispose of that.

Pending this hearing, the complainants, by leave, amended their prayer in the bill by adding the following: "And, in case it shall appear that said respondent corporation is hopelessly insolvent, the court may order said corporation to be wound up and dissolved." With this was a prayer for the appointment of a receiver to have the control of the corporation's assets "until further order of court," with the further prayer that the respondent corporation might be decreed to make a transfer to such receiver. This relates only to an interlocutory receiver, and is subject to the observations we have already made.

Independently of any question whether this court should interpose against the bankruptcy statutes and the statutes of the state with reference to winding up corporations, or the collection of debts, and under its general equity powers close the affairs of an insolvent corporation, the prayer which thus came in by amendment with reference to the issue of insolvency is not effectual, in view of the fact that the bill is not framed in that direction. This prayer for relief, thus

brought in by amendment, was clearly an after-thought, and it does not change the position of the case as it is presented to the court, namely, that the bill was brought merely to obtain a receiver, without any purpose of prosecuting it to final relief.

In view of the considerations we have stated, we have no occasion to discuss the merits of the case with regard to the appointment of a receiver if the bill were properly framed to give us jurisdiction for such an appointment. The same principles apply with reference to the exercise of discretionary powers for the appointment of receivers as to the exercise of discretionary powers for preliminary injunctions, which powers, in either event, unless used carefully, run into uncontrolled and arbitrary action on the part of a single judge. The safeguards against this are the rules laid down by the Circuit Court of Appeals for this circuit in *Hatch Storage Battery Co. v. Electric Storage Battery Co.*, 41 C. C. A. 133, 100 Fed. 975, with reference to interlocutory injunctions, and by the same court in *Post v. Electrical Co.*, 28 C. C. A. 431, 84 Fed. 371, to the effect that courts in equity ought not, on the application of minority interests in the stock of a corporation, interfere in what has been approved by the majority, unless the complainants have a clear and substantial grievance. Merely a technical injury, or one which involves only nominal consequences to the complainants, or circumstances which are doubtful, are not sufficient to call into action the conscience of the chancellor.

In view of the facts that the affidavits now before us show that the respondent corporation has been practically inert for many years, and that they raise no belief that, in any event, under the most advantageous circumstances, we could work out any surplus for the shareholders, and that they do not indicate that the complainants have any pecuniary interest in the payment of the corporate debts, it may well be doubted whether the case shows clearly that the complainants could derive any substantial advantage if we granted all the bill now asks. However this may be, we do not find it necessary to fully consider it, because the other aspects to which we have referred determine this present question against the complainants.

The petition for the appointment of a receiver, filed the 25th day of August, 1900, is denied.¹

¹ EFFECT OF THE BANKRUPTCY LAW. The Bankruptcy Act of 1898 permits no corporation to be a voluntary bankrupt. Petitions for involuntary bankruptcy may be filed against "any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over." Section 4. This provision has been held to include a corporation carrying on a Mercantile Agency, *Re Mutual Mercantile Agency Co.*, 110 Fed. Rep. 152; engaged chiefly in smelting, *Re Tecopa Mining & Smelting Co.*, 110 Fed. Rep. 120; or operating a private hospital for profit, *Re San Gabriel Sanatorium*, 95 Fed. Rep. 271. But not corporations engaged in mining and selling coal or ore or metal obtained thereby, *Re Elk Park Mining Co.*, 101 Fed. Rep. 422; *Re Victoria Zinc Mining Co.*, 102 Fed. Rep. 982; *Re Chicago-Joplin Lead Co.*, 104 Fed. Rep. 67; *Re Woodside Coal Co.*, 105 Fed. Rep. 56; *Re Keystone Coal Co.*, 109 Fed. Rep. 872; nor a mutual insurance company, *Re Cameron, &c., Ins. Co.*, 96 Fed. Rep. 756; nor a construction company, *Re Minnesota &c. Construction Co. (Ariz.)*, 60 Pac. Rep. 881; nor a corporation engaged in giving theatrical performances, *Re Oriental Society*,

104 Fed. Rep. 975. A bankrupt corporation is entitled to a discharge, *Re Marshall Paper Co.*, 102 Fed. Rep. 872.

Even though a corporation is within the classes covered by the bankruptcy law and is insolvent, a court may nevertheless appoint a receiver. Such an appointment does not prevent proceedings in bankruptcy, and if the corporation is adjudged a bankrupt the receiver must surrender the property to the trustee in bankruptcy. *Re Independent Ins. Co.*, 6 B. R. 169, 260; *Platt v. Archer*, 6 B. R. 465; *Re Merchants' Ins. Co.*, 6 B. R. 43; *Re Safe Deposit, &c., Inst.*, 7 B. R. 392; *Re Green Pond Co.*, 13 B. R. 118; *Re Noonan*, 3 Biss. 491; *Re Nat. Life Ins. Co.*, 6 Biss. 35; *Re Lengert Wagon Co.*, 110 Fed. Rep. 927; *Re Kersten*, 110 Fed. Rep. 929; *Mauran v. Crown Carpet Lining Co. (R. I.)*, 4 N. B. N. 32. But the failure of a corporation to object to the appointment of a receiver, or indeed its assent thereto, is not in itself an act of bankruptcy. *Re Empire Metallic Bedstead Co.*, 95 Fed. Rep. 957, affirmed 98 Fed. Rep. 981; *Re Baker-Ricketson Co.*, 97 Fed. Rep. 489; *Vaccaro v. Security Bank*, 103 Fed. Rep. 436 (C. C. A.). — Ed.

SECTION II.

Rights and Liabilities of Receivers.

PORTER v. SABIN.

1893. 149 *United States*, 473.¹

THIS was a bill in equity, filed September 9, 1887, and amended January 7, 1888, in the Circuit Court of the United States for the District of Minnesota, by Henry H. Porter and Ransom R. Cable, citizens of Illinois, and stockholders in the Northwestern Manufacturing and Car Company, a corporation of Minnesota, in behalf of themselves and of all other stockholders in that corporation, against Dwight M. Sabin, its former president, and Joseph C. O'Gorman, its former auditor and treasurer, and both citizens of Minnesota. The amended bill made that corporation, and the Minnesota Thresher Manufacturing Company, also a corporation of Minnesota, parties defendant.

Sabin & O'Gorman were directors of the car company, and had the entire management of its business. While so managing the car company, they used its credit by indorsing in its corporate name a large amount of paper for the benefit of third parties, which resulted in great loss to the car company. These transactions were so carried on as to give an undoubted right of action in favor of the car company against them. On the 10th of May, 1884, the car company failed, and one Edward S. Brown was appointed receiver in a suit by the creditors commenced in the state court. The complainants, as stockholders, applied to such receiver, and through him to that court, to bring a suit against the defendants Sabin & O'Gorman to ascertain and recover the damages sustained by the corporation by reason of their fraudulent and unauthorized acts, which application was denied. Thereupon this suit was brought by the filing of the original bill, and on the same day the complainants made a motion in that court to be allowed to make the receiver a party defendant. They also subsequently moved to exclude from a contemplated order of sale all causes of action which stockholders might maintain in right of the corporation, and which the corporation itself or its receiver had refused to bring, both of which motions were denied; and that court entered an order directing a sale as a whole of the entire assets and plant of the car company. A public sale was made in pursuance of this order, and the property sold to the Minnesota Thresher Manufacturing Company. This sale was confirmed, and the property delivered about the 1st of January, 1888. The last-named company, which is made a

¹ Statement taken mainly from opinion of Brewer, J., in 36 Fed. Rep. 475.

defendant to this suit, was organized in 1884 for the express purpose of acquiring the property and continuing the business of the car company. During the winter of 1886-87 Sabin & O'Gorman obtained the control of the directory and management of the Thresher company, and, for the purpose of preventing an investigation into their management of the car company's business, made application to have the car company's assets sold as a whole, which application was successful; and also resisted the application of these complainants to have suit brought in the name of the receiver. To this bill the defendants have, as stated, filed a demurrer.

The Circuit Court sustained the demurrer, and dismissed the bill. 36 Fed. Rep. 475. The plaintiffs appealed to this court.

Mr. J. M. Flower, for appellants.

Mr. Cushman K. Davis, for appellees.

Mr. Frank B. Kellogg filed a brief for Sabin & O'Gorman, appellees.

Mr. Frank W. M. Cutcheson filed a brief for The Minnesota Thresher Manufacturing Co., appellee.

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The right to maintain a suit against the officers of a corporation for fraudulent misappropriation of its property is a right of the corporation; and it is only when the corporation will not bring the suit, that it can be brought by one or more stockholders in behalf of all. *Hawes v. Oakland*, 104 U. S. 450. The suit, when brought by stockholders, is still a suit to enforce a right of the corporation, and to recover a sum of money due to the corporation; and the corporation is a necessary party, in order that it may be bound by the judgment. *Davenport v. Dows*, 18 Wall. 626. If the corporation becomes insolvent, and a receiver of all its estate and effects is appointed by a court of competent jurisdiction, the right to enforce this and all other rights of property of the corporation vests in the receiver, and he is the proper party to bring suit, and, if he does not himself sue, should properly be made a defendant to any suit by stockholders in the right of the corporation. All this is admitted in the plaintiffs' bill, as well as in the brief and argument submitted in their behalf.

The grounds on which they attempt to maintain this suit are that the court which appointed the receiver has denied his petition for authority to bring it, as well as an application of the plaintiffs for leave to make him a party to this bill.

Their position rests on a misunderstanding of the nature of the office and duties of a receiver appointed by a court exercising chancery powers, and of the extent of the jurisdiction and authority of the court itself.

In *Brinckerhoff v. Bostwick*, 88 N. Y. 52, and *Ackerman v. Halsey*, 10 Stewart, (37 N. J. Eq.) 356, cited for the plaintiffs, in which stockholders of a national bank were permitted to bring such a suit when

a receiver had refused to bring it, the receiver was not appointed by a judicial tribunal, but by the comptroller of the currency, an executive officer.

When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. *Wiswall v. Sampson*, 14 How. 52, 65; *Peale v. Phipps*, 14 How. 368, 374; *Booth v. Clark*, 17 How. 322, 331; *Union Bank v. Kansas City Bank*, 136 U. S. 223; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 297.

It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation, the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him. *Barton v. Barbour*, 104 U. S. 126; *Texas & Pacific Railway v. Cox*, 145 U. S. 593, 601.

The reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by that court of the estate in the receiver's hands to be interfered with, by a court of the United States, deriving its authority from another government, though exercising jurisdiction over the same territory. The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remains in its custody, to be administered and distributed by it. Until the administration of the estate has been completed and the receivership terminated, no court of the one government can by collateral suit assume to deal with rights of property or of action, constituting part of the estate within the exclusive jurisdiction and control of the courts of the other. *Wiswall v. Sampson*, *Peale v. Phipps*, and *Burton v. Barbour*, above cited; *Williams v. Benedict*, 8 How. 107; *Pulliam v. Osborne*, 17 How. 471, 475; *People's Bank v. Calhoun*, 102 U. S. 256; *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294; *In re Tyler*, 149 U. S. 164.

The state court, upon further hearing or information, may hereafter reconsider its former orders, so far as no rights have lawfully rested under them, and may permit its receiver to sue or be sued upon any controverted claim. But should it prefer not to do so, the right of action of the corporation against its delinquent officers, like

other property and rights of the corporation, will remain within the exclusive jurisdiction of that court, so long as the receivership exists.

It is not material to the decision of this case whether the sale of the entire assets of the corporation by order of the state court did or did not pass this right of action to the purchaser. If it did, neither the corporation, nor the receiver or any other person asserting this right in its behalf, can maintain an action thereon. If it did not, the right of action remains part of the estate of the corporation within the exclusive custody and jurisdiction of the state court.

*Decree affirmed.*¹

SAGER MANUFACTURING COMPANY v. SMITH.

1899. 45 *New York Appellate Division of Supreme Court*, 358.²

APPEAL by the defendant, Frank Sullivan Smith, from a judgment in favor of the plaintiff. The action was brought to recover for goods sold to the defendant, for which it is alleged he became personally liable.

The plaintiff was a domestic corporation, engaged in the manufacture of bicycle supplies. The Worcester Cycle Manufacturing Company was a corporation engaged in manufacturing bicycles in Massachusetts. On June 30, 1897, the defendant was appointed receiver of the latter corporation by the United States Circuit Court for the District of Massachusetts, and as such receiver took possession of its property and entered upon the discharge of his duties. The material portions of the order appointing him appear in the following opinion. The defendant, on April 18, 1898, ordered from the plaintiff 1500 cycle saddles to be shipped to the Worcester Cycle Manufacturing Company. The order was signed "Worcester Cycle Mfg. Co., Frank Sullivan Smith, Receiver, Geo. S. MacDonald, Purchasing Agent, General Manager." It was conceded that MacDonald had authority from the receiver to make the purchase.

All the saddles were delivered and part were not paid for. All the saddles were shipped as directed in the order, and all communications

¹ By section 3 of the Judiciary Act of 1887, corrected by the Act of March 13, 1888 (25 Stat. at L. 433) it is provided: "That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

This statute has been construed as allowing a receiver appointed by a Federal Court to be sued without leave of court not only in Federal courts but in State courts. *McNulta v. Lochridge*, 141 U. S. 327; *Texas, &c., R. Co. v. Johnson*, 151 U. S. 81; *Central Trust Co. v. East Tennessee, &c., R. Co.*, 59 Fed. Rep. 523; *McNulta v. Lochridge*, 137 Ill. 270; *Malott v. Shriner*, 153 Ind. 35; *Dillingham v. Russell*, 73 Tex. 47. — ED.

² Statement abridged.

in relation to the matter were addressed to or signed by Frank Sullivan Smith, receiver.

Charles J. Bissell, for the appellant.

Isaac Adler, for the respondent.

McLENNAN, J. : —

But two questions are presented upon this appeal :

First. Was the defendant authorized, by the order of the court appointing him receiver, to make the purchase in question ?

Second. If the defendant acted within the scope of the authority conferred by the order appointing him receiver in making the purchase in question, and fully disclosed the character in which he assumed to act, did he incur a personal liability ?

A receiver has no power, unless expressly authorized by the court appointing him, to incur any expense on account of property in his hands, except such as is absolutely necessary for its preservation. (*Vilas v. Page*, 106 N. Y. 439.)

The decree appointing the defendant receiver expressly authorized him "to carry on and continue the business," so far as necessary to enable him to collect the accounts and sums due or to become due. This provision clearly authorized the defendant to fill any contracts which the cycle company had entered into, and which were partially performed, to the end that the contract price might become due and collectible. In order that such contract price should become due and payable it was undoubtedly necessary, in certain instances, to furnish additional parts of or even additional bicycles complete, and to do this it was necessary that the business should be continued. Unless the clause in question was intended to enable the receiver to meet just such a condition of things it is meaningless.

Again, the decree provides : "Said receiver is hereby fully authorized to continue to operate and carry on the business of the defendant Cycle Company, in such a manner as the same is now conducted, or in such manner as will in his judgment produce the most satisfactory results, so far as may be necessary for the preservation from loss of the outstanding contracts of said defendant Cycle Company."

By this clause, also, we think the court intended to make provision for completing at least the contracts which the cycle company had entered into and which it had partially performed, and intended to authorize the receiver to complete such contracts, in order that he might be in a position to demand and collect the contract price. If the cycle company had entered into a contract by which it had bound itself to furnish, on or before a certain date, 1000 wheels, at an agreed price, to become due and payable only upon the delivery of the entire number of wheels, notwithstanding two thirds of the bicycles had been delivered at the time the receiver was appointed, no part of the contract price could be recovered by him until the other third of the bicycles were delivered. To meet such a contingency he was authorized to carry on the business and in order that he might furnish the

remaining bicycles called for by the contract, and thus be in a position to demand and enforce payment for the whole.

By still another clause in the decree the receiver was authorized from time to time, out of the funds coming into his hands from the operation of the property and otherwise, to pay the expenses of operating the same.

It would be folly to say that the receiver was given authority to carry on the business of manufacturing for the purpose of enabling him to collect moneys which were due to the cycle company, or which should become due at a future time, without any further act on the part of the cycle company. It would be equally meaningless to authorize the receiver "to operate and carry on the business . . . so far as may be necessary for the preservation from loss of the outstanding contracts," unless there were contracts in such condition that additional work or additional material were required in order to make such contracts available as an asset in the receiver's hands.

Considering the nature of the property purchased, the character of the business of the insolvent corporation and the language of the decree, the presumption arises that the purchase was made in obedience to the order of the court, and for the purpose intended by the court, rather than that it was made for a purpose not contemplated by the decree.

We conclude that the defendant was expressly authorized by the decree appointing him to purchase the saddles in question; that he, in effect, informed the plaintiff, by the order for the saddles itself, that he was receiver of the Worcester Cycle Manufacturing Company; that it was located in a foreign jurisdiction; that the goods were to be used in such foreign jurisdiction, and that he desired to purchase them as receiver of such foreign corporation. With that information the plaintiff accepted the order and shipped the goods to the defendant as receiver, and delivered them to him at the factory of the corporation of which he was receiver.

A receiver of a foreign corporation domiciled in a sister State has the right to enter into a contract for the purchase of goods in this State, and relieve himself from personal liability, and the plaintiff had the right to sell its goods to the receiver of a foreign corporation, incorporated and doing business under the laws of a sister State, and to absolve such receiver from all personal liability on account of such sale. This is precisely what the parties to the transaction in question did, unless there is some principle of law applicable to contracts made by receivers which overturns the rules which ordinarily control contracts, and imposes additional or a more strict liability when a receiver is a purchaser than when the purchase is made by an individual.

In case an agent makes a purchase of property as such, discloses the name of his principal for whom the purchase is made and for whom he is acting, no personal liability attaches. No matter in what juris-

diction such purchase is made, and no matter where the goods are to be delivered, if the place of delivery is specified in the contract.

If the defendant in this case had said to the plaintiff, "I am the agent for a corporation doing business in a sister State; I wish to purchase goods for it as such agent, and desire you to ship the goods which I may purchase to such corporation," in case of a sale personal liability on the part of the agent would not be pretended, provided only the defendant had authority to represent such corporation.

Instead, in the case at bar the defendant almost in so many words said: "I represent the Circuit Court of the United States for the District of Massachusetts, as receiver of a corporation over which such court has jurisdiction. I am directed or authorized by such court to buy goods for the purposes of such corporation, to be used within the State of Massachusetts, and I desire to purchase your goods." The plaintiff assents and ships the goods to the defendant as receiver, and into the State of Massachusetts.

In the case of *Livingston v. Pettigrew* (7 Lans. 405) it was sought to hold a receiver personally liable on his covenant as receiver that a certain amount was due on a claim sold by him. The plaintiff was nonsuited and the court said: "He (the plaintiff) trusted to the receiver in his official capacity, understood that he acted as such, and upon no sound principle can it be claimed that under such circumstances the receiver should be personally liable."

In *Beach on Receivers* (§ 305) it is said: "'The receiver is the mere officer or instrument of the court in the preservation and operation of the property, and any acts of his not within the scope of the authority conferred by the order appointing him, and not otherwise authorized by the court, do not bind the court.' . . . This is the application of the principle which declares and fixes the personal liability of an agent who enters into a contract with a third person without the authority of the principal. . . . It produces the correlative, that when a receiver acts within the scope of his authority as given by the court, he incurs no personal liability. . . . Under no circumstances does a receiver incur any personal liability when he acts in strict conformity with the directions of the court, where it has jurisdiction to make the order." (*High Receivers*, § 272; *Smith Receivers*, 229.)

Cook, in his work on *Corporations* (§ 878), states the rule as follows: "A receiver is not liable personally on debts, contracts, and liabilities incurred by him as receiver. A few cases hold to the contrary, but the settled rule is that the receiver, being only an agent of the court, is no more liable than the court itself."

It is the settled law in this State that a receiver who enters into a contract as such, by the direction or authority of a court having jurisdiction to confer such authority or make such direction, is not personally liable upon the contract so entered into.

In *Cardot v. Barney* (63 N. Y. 281) the head note is as follows: "An assignee or receiver in bankruptcy of an insolvent railroad cor-

poration, who, as such assignee, is running and operating its road, in the absence of evidence that he assumed to act other than as assignee, or that he held himself out as a carrier of passengers other than as an officer of the court, is not liable in an action for negligence causing the death of a passenger, where no personal neglect is imputed to him, either in the selection of agents or in the performance of any duty, but where the negligence charged was that of a subordinate whom he necessarily and properly employed in compliance with the order of the court."

It is equally well settled that if a receiver, although authorized by the court to contract as such, assumes to contract in his individual capacity, although for the benefit of his trust, or if he assumes to contract as receiver without authority so to do, he will be held personally liable. The cases cited by respondent's counsel in no way conflict with these propositions.

In *Ryan v. Rand* (20 Abb. N. C. 313) the plaintiff, who was a stenographer, and had been employed by the attorney for a receiver, brought suit against the receiver personally to recover for services rendered. The receiver was held personally liable, because "the receiver, as a rule, cannot involve the estate in expense without the sanction of the court," and because "there was no authority from the court making the plaintiff's demand a charge upon the estate, and the defendant has no power to make it a charge thereon, except by payment, then charging it in his accounts, and having them sanctioned in the usual way."

Sayles v. Jourdan (19 N. Y. St. Repr. 349; affd. 121 N. Y. 685) was an action to recover for merchandise furnished to a hotel which the defendant, who was receiver of a railroad company, assumed to run in connection with the railroad. The defendant was held personally liable, because "there is no evidence that the defendant was running this hotel as receiver by direction of the court."

In *Rogers v. Wendell* (54 Hun, 540) the receiver of the Carthage Company, as such, authorized one Embury to take possession of the property and to employ such help as was necessary. Embury employed the plaintiff. The receiver was held personally liable, because there was no order of the court directing the receiver to employ the plaintiff or other person, or to incur any expenses in connection with the trust property. In that case it is said, MARTIN, J. (p. 546): "A receiver cannot of his own motion contract debts chargeable upon the fund in litigation. While a court may allow expenses incurred by a receiver for the preservation of the property, it is, nevertheless, the order of the court, and not the act of the receiver, which creates the charge, and upon which its validity depends."

These cases and many others to which attention has been directed but restate the rule that where a receiver assumes to contract, as such, but without authority to do so, he is personally liable. Such want of authority may arise because of the omission from the order or decree

of the court of language suitable to confer the same, or because the court was without jurisdiction to confer such authority.

We think the case of *Kain v. Smith* (80 N. Y. 458) is within this principle, and is distinguishable from the case at bar. In that case the defendant had been appointed receiver of the Vermont Central Railroad by the Court of Chancery of the State of Vermont. By the decree of such court he was authorized, in his discretion, to lease and operate the Ogdensburg and Lake Champlain Railroad, which was wholly within the State of New York. The defendant made the lease and assumed to operate such railroad as receiver. An accident occurred in which an employee upon the leased line was injured, and an action was brought against the defendant personally to recover damages for the injury. The defendant was held personally liable. Concededly, the Vermont court had no jurisdiction over the Ogdensburg and Lake Champlain Railroad, or of its property, rights, or franchises. It had no power to control its operation or management, and it could not clothe its agent with such power or authority. It could not make him an official, or invest him with any official function in the operation of the leased railroad cognizable by the courts of this State. The power of the Vermont court was exhausted when it gave its receiver permission to lease; and such permission could only become useful upon the accounting of the receiver in the court which appointed him, and as a protection to him.

If the defendant in the case at bar had assumed as receiver to lease and operate the factory of the plaintiff, and had purchased supplies for its operation from other parties for which recovery was sought, the case would be analogous to the case of *Kain v. Smith* (*supra*). In such case the defendant would clearly be liable, because he would not have authority, and could not be clothed with authority by a foreign court, to carry on such business; and, as before said, whenever a receiver assumes to contract without authority he becomes personally liable.

As we have seen, the defendant was directed by the United States Circuit Court for the District of Massachusetts to continue the business of the corporation of which he was appointed receiver, and to do so it was necessary, or at least proper, for him to purchase certain parts of bicycles. In making such purchases was the defendant confined in the State of Massachusetts, or, if he purchased from dealers outside of the State, was it at the risk or certainty of being personally liable?

Admittedly, if the defendant purchased from manufacturers within the State of Massachusetts, and disclosed his authority and the capacity in which he assumed to act, no personal liability would attach. Does a different rule apply because the vendor or his factory, or both, were within a sister State?

If a receiver of a manufacturing corporation, appointed by the courts of this State and authorized to continue and carry on the business of such corporation, and to purchase supplies and materials for that purpose, enters into a contract as receiver with a resident of

this State for furnishing such supplies, and discloses the capacity in which he assumes to act, he will incur no personal liability. In such case the vendor would have a cause of action against him as receiver only. If, perchance, the vendor in such case is a resident of and has his wares located in a sister State, does he thereby acquire greater rights and become entitled, at his option, to maintain an action either against the receiver as such or against him personally? We think there is no such distinction; that the rule may be stated to be: Where a receiver of a corporation is duly appointed by a court of a sister State and given authority to continue the business of such corporation and to make purchases for that purpose, such receiver may make such purchases in the State in which he is appointed, or in any other State, without being personally liable therefor, provided only that he discloses the character in which he assumes to act, and the source of such authority.

It follows that the judgment appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

All concurred, except SMITH, J., not voting.

Judgment reversed and a new trial ordered, with costs to the appellant to abide the event.¹

STOKES, RECEIVER, v. HOFFMAN HOUSE OF NEW YORK.

1899. 46 *New York Appellate Division of Supreme Court*, 120.²

VAN BRUNT, P. J. :

An action having been commenced by the Farmers' Loan and Trust Company as trustee against the Hoffman House, a New Jersey corporation, to foreclose certain mortgages covering leases and chattels belonging to the defendant therein and which were in the possession of this defendant, and with and upon which it was carrying on a hotel and café business in the city of New York, on the 21st of December, 1893, an order was made appointing Edward S. Stokes receiver of the property covered by the mortgage to foreclose which the action was brought. The order provided that the said receiver "be and he hereby is authorized and empowered to take possession of and carry on the several hotels and restaurants, the leases of and chattels in which are covered by the said mortgage, with authority to employ and pay such employees, agents, and servants as may be necessary in carrying on said places, and to purchase such supplies as may be necessary for the conduct of said hotels and restaurants, and with authority to do any and all other things which may be necessary or proper to be done in the general and ordinary conduct of similar places of business."

¹ Affirmed without opinion in 167 N. Y. 600. — Ed.

² Statement and part of opinion omitted.

The said Edward S. Stokes, as receiver, entered into possession of the property mentioned in said foreclosure action and continued to conduct the business theretofore carried on upon and with said property until the 25th of May, 1894.

During all the time that the said receiver was in possession of the leasehold property known as the Hoffman House, he paid no rent to the owners of the leases, nor was any application made to him by the landlord either for the possession of the property or for the payment of rent. The landlord insisted, however, that in the terms of sale under which the said leases were to be sold in the foreclosure action, he should be protected so that the purchaser at said foreclosure sale might be required to pay the rent which had accrued from the 1st of December, 1893, no rent having been paid subsequent to that date. Accordingly the terms of sale were submitted to the landlord, and he was assured by Edward S. Stokes, one of the incorporators of the new corporation, the proposed purchaser, that the purchaser upon going into possession of the property would pay all the back rents. As soon as the Hoffman House corporation went into possession the landlord made a demand for the payment of the rent, and threatened that unless a substantial payment was made on account thereof, he would take proceedings to recover the possession of the leased property. The Hoffman House of New York, having no money with which to pay this rent, in order that that company, of which Edward S. Stokes was president, might keep possession of the property, the said Stokes, as receiver, out of the moneys in his hands as receiver, wrongfully, as is claimed by the plaintiff, paid to the landlord the sum of \$10,000 on account of rent, and subsequently the Hoffman House corporation of New York paid all the balance of the rents, amounting to many thousands of dollars.

The next question necessary to consider is the claim made by the receiver against the defendant for the \$10,000 paid on account of rent; and it would seem that the solution of this contention depends upon the question as to whether there was any liability upon the part of the receiver, at the time of this payment, for the rent which had accrued during the period of his occupation of the premises. It is urged upon the part of the plaintiff that no such liability exists, because he was not a statutory receiver but simply a custodian of the premises and of the business which was therein conducted, having no title to the leases of such premises.

The defendant, however, claims that the receiver, by taking possession of the leased premises and remaining in possession, elected to accept the relation of tenant to the landlord and made himself personally liable for the rent; and, in support of this proposition, cites the cases of *Woodruff v. Erie Ry. Co.* (93 N. Y. 609); *Frank v. N. Y., L. E. & W. R. R. Co.* (122 *id.* 197); *Wells v. Higgins* (132 *id.*

459), and *U. S. Trust Co. v. Wabash Ry. Co.* (150 U. S. 299), and other cases which it is not necessary to particularly mention.

In the case of *Woodruff v. Erie Ry. Co.* (*supra*), by the order appointing the receiver, it is apparent that it was contemplated by the court that the receiver should pay the rent under the lease, as he was expressly given authority to continue the operation of the railroad of the company and to pay any rent then due or thereafter becoming due under the lease. It further appeared that rent was claimed of him by the landlord, and that he refused to pay or to surrender possession of the premises; and the court held that under such circumstances, by continuing the use and occupation of the property acquired under the lease, a liability for the payment of rent under the lease was incurred.

The case of *Frank v. N. Y., L. E. & W. R. R. Co.* (*supra*) related only to the case of an assignee of a term and not to a mere custodian.

In the case of *Wells v. Higgins* (*supra*) executors and trustees were removed and a receiver appointed of the rents and profits of the real estate, freehold or leasehold, and of the personal property; and he was expressly authorized to pay taxes and assessments and other lawful charges thereon. In pursuance of this authority the receiver paid rent to the landlord for a portion of the time, and he was held liable for the balance of the time he occupied the premises.

In the case of *United States Trust Co. v. Wabash Railway* (150 U. S. 299) the rule is laid down that under certain circumstances even a chancery receiver may be liable for rent of premises occupied by him. Before discussing this case, however, it will be necessary to call attention to the case of *The Quincy, M. & P. R. R. Co. v. Humphreys* (145 U. S. 82). In the latter case the receivers were appointed to take charge of and operate railroads composing the Wabash system. They operated the leased line for over a year, and the proceedings were brought by the lessor to compel the receivers to pay the rent. The court unanimously affirmed a denial of the application upon the ground that there was no liability upon the part of the receiver, and used the following language: "It is not asserted that these receivers became the assignees of the unexpired term of the leasehold estate with the right to dispose of it, but it is claimed that because they took possession of the railroad of the Quincy Company and held and operated it until August 1, 1885, they became liable to the extent of the rental up to that time. But the receivers were not statutory receivers, nor did they occupy identically the same position as assignees in bankruptcy or insolvency, and the like. They were ministerial officers appointed by the Court of Chancery to take possession of and preserve *pendente lite* the fund or property in litigation; mere custodians, coming within the rule stated in *Chicago Union Bank v. Kansas City Bank* (136 U. S. 223, 236), where this court said: 'A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed;

and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession in the property.'

"As observed in relation to such a receiver, by the Supreme Court of Maryland, in *Gaither v. Stockbridge* (67 Maryland, 222, 224), cited by counsel for appellee: 'It is manifest that the scope of his duties and powers are very much more restricted than those of an assignee in bankruptcy or insolvency. In the case of an assignee in bankruptcy the law casts upon such assignee the legal title to the unexpired term of the lease and he thus becomes assignee of the term by operation of the law, unless, from prudential considerations, he elects to reject the term as being without benefit to the creditors. But not so in the case of receivers, unless it be, as in New York and some of the other States, where by statute, a certain class of receivers are invested with the insolvent's estate, and with powers very similar to those vested in an assignee in bankruptcy. (*Booth v. Clark*, 17 How. 331.) The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court; and, by special authority, may become an officer of the court to effect a sale of the property, if that be deemed necessary, for the benefit of the parties concerned. If the order of the court, under which the receiver acts, embraces the leasehold estate, it becomes his duty, of course, to take possession of it. But he does not, by taking such possession, become assignee of the term in any proper sense of the word. He holds that, as he would hold any other personal property involved, for and as the hand of the court, and not as assignee of the term.'

In the case of *United States Trust Co. v. Wabash Railway* (*supra*) the broad rule laid down in the case last cited is modified by holding that where a chancery receiver under the express sanction of the court keeps the landlord out of possession who is endeavoring to obtain possession, he is equitably liable for the rent during the time during which he has thus kept such landlord out of possession.

From an examination of these authorities, it seems to us that the principle which controls in cases of this character is that mere occupation, undisturbed, and with the consent of the landlord, by a chancery receiver, in no manner renders the fund in his hands liable for rents accruing during such occupation; but that if such receiver remains in possession after a demand for the payment of rent by the landlord, or keeps the landlord out of possession of the premises with the sanction of the court, the funds in his hands become equitably chargeable with the rent accruing during such occupation. In other words, a chancery receiver, by merely remaining in possession of premises with the consent of the landlord, cannot be held to have adopted the lease so that there is any privity either of contract or estate between himself and the landlord.

Applying this rule to the case at bar, we find that no claim for rent was made by the landlord upon the receiver; that he remained in possession and continued the business with the consent of the landlord; that the landlord did not look to him for the payment of any rent, but that his solicitude was to be assured that the purchaser upon the foreclosure sale could be compelled to pay that rent, and that being satisfied with the terms of sale he made no claim whatever for rent until after the deed in the foreclosure suit had been delivered and the purchaser let into possession.

The landlord then demanded the rent of the purchaser, and the purchaser being unable to pay, and the receiver being substantially the corporation which was let into possession, wrongfully took the money in his hands as receiver to pay the obligations due to the landlord which it was necessary to pay in order that his corporation should remain in possession of the premises.

The definition of the authority of a chancery receiver, as contained in the cases of *Keeney v. Home Insurance Co.* (71 N. Y. 396) and *Davis v. Gray* (16 Wall. 218), are in harmony with the above rule. In *Keeney v. Home Ins. Co.* it is said: "A receiver *pendente lite* is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided. The title to the property is not changed by the appointment. The receiver acquires no title, but only the right of possession as the officer of the court. The title remains in those in whom it was vested when the appointment was made. The object of the appointment is to secure the property pending the litigation, so that it may be appropriated in accordance with the rights of the parties, as they may be determined by the judgment in the action."

In *Davis v. Gray* (*supra*) the following language is used: "He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties in the litigation. He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is in *custodia legis*. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits."

So, also, in *Decker v. Gardner* (124 N. Y. 338) it is said: "Such receivers possessed no legal powers. They were officers of the court merely, and their functions were limited to the care and preservation of the property committed to their charge, and they possessed no authority except such as the orders of the court conferred."

It may be claimed, however, that under the terms of the order by which the receiver was appointed he was directed by the court to pay this rent as a necessary incidental expense towards the carrying on of the business which he was authorized to conduct. It seems to us that an examination of the language of that order shows that it will not bear any such interpretation. By the order appointing the

receiver he was authorized and empowered to take possession of and carry on the several hotels and restaurants, the leases of and chattels in which were covered by the mortgage being foreclosed, with authority to employ and pay such employees, agents, and servants as may be necessary in carrying on said places.

There is not a word said in this order in regard to the payment of any rent either due or to become due. The receiver was to take possession of and carry on the several hotels and restaurants. Then follows the authority to disburse money conferred upon him by the order; it is, "with authority to employ and pay such employees, agents, and servants as may be necessary in carrying on said places and to purchase such supplies," etc. Under this part of the order it is clear that there was no right to pay rent. It referred entirely to those things which were necessary in the conduct of the hotel business and not to the furnishing of premises in which such business should be carried on. He was to pay the employees and to purchase supplies. This was the class of disbursements he was authorized to make. The order proceeds "with authority to do any and all other things which may be necessary or proper to be done in the general and ordinary conduct of similar places of business." These words evidently refer to the incidental expenses necessary for the conduct of that business; and which in a particular manner had been previously mentioned in the order, namely, the wages of employees and the purchase of supplies. The general language used was not intended to confer authority to make any and every disbursement which the receiver might think proper; but only disbursements of the character previously referred to in the order and which might not perhaps come within the exact language therein used. If it had been contemplated to cover the extraordinary expenditure of many thousands of dollars of rent upon these long leases which were the subject-matter of foreclosure, it would certainly have been designated by the court, it being so particular to specify the nature of the expenditures which the receiver under the order was to be authorized to make. This is the rule recognized in the case of *Quincy, etc., R. R. Co. v. Humphreys* (145 U. S. 83) as well as the case of *United States Trust Co. v. Wabash Railway* (150 *id.* 287).

It seems to be well established by authorities in this State that receivers such as the plaintiff possess no legal powers. They are officers of the court merely, and their functions are limited to the care and preservation of the property committed to their charge, and they possess no authority except such as the orders of the court confer.

In the case of *Wyckoff v. Scofield* (103 N. Y. 630) it was held that the receiver of rent and profits in a foreclosure suit had no power without the order of the court to lessen the fund in his hands by expenditures for repairs even though such repairs might have been necessary to preserve the property, the court holding that if necessary for the preservation of the property the court might direct the expendi-

ture, but that the receiver had no authority to make it without such direction.

It, therefore, follows in the case at bar that, without some direction from the court from which he derived his authority to which the receiver could point authorizing the expenditure thus made by him, the payment of the rent out of funds in his hands was a misappropriation, as he had no right to deplete the fund in his hands in that way, he not being able to create such a liability. Therefore, there being no liability upon the part of the receiver for this rent, and it having been paid for the purposes of the defendant corporation by its president wrongfully applying funds in his hands as receiver therefor, it seems to us that he is entitled to recover it back in order to make the fund good to the extent of the wrongful expenditure made by him.

In regard to the question of interest, without any lengthy discussion upon the subject, it would seem that it was the ordinary case, not of an unsettled or unliquidated account, but of an account which settled and liquidated itself, and which would naturally bear the interest allowed by the referee.

We are of opinion, therefore, that the judgment and order should be affirmed, with costs.

BARRETT, PATTERSON, and O'BRIEN, JJ., concurred; RUMSEY, J., dissented.¹

¹ Barrett, J., delivered a concurring opinion; Rumsey, J., a dissenting opinion. On appeal, the decision was affirmed by a divided court in 167 N. Y. 554. Cullen, J., who delivered the opinion of the majority, said at the close of his opinion: "We have not decided that the lessors had not a most equitable claim to have all the net profits of the operation of the hotel, after the payment of its running expenses, applied to the payment of the rent of the premises, the use of which by the receiver produced the fund in court. In *Matter of Otis* Judge ANDREWS said: 'If the leased premises are occupied by the committee, and such occupation is to the advantage of the estate, as where it was necessary in order to carry on or close up the business of the lunatic, the rent accruing during such occupation would justly be regarded as a reasonable expense incurred by the committee.' Nor do we decide that the defendant did not, under the terms of the sale, by which it was to receive the property free and clear of unpaid rent, succeed to the equities of the lessor as well as acquire new equities of its own. The defendant has not been without remedy. During the pendency of this action it could have applied in the foreclosure suit for an order of the court ratifying the payment made by the receiver on account of the rent. If such a motion had been granted, it would have disposed of that claim and no recovery for the amount could have been allowed. It is not too late for the defendant now, by application in the foreclosure suit, to have all its equities established and preserved. It may move the court for a ratification for the payment of rents made by the receiver and for a direction to its officer to reduce the judgment by that amount and interest. If the amount of the present recovery is to be ultimately restored to the defendant on account of the unpaid rent which it should have been allowed out of the purchase money, this judgment might be permitted to stand unenforced as settling the accounts between the receiver and the defendant, and to be credited as a payment on such restoration. All these matters, however, are questions which can be determined only in the foreclosure action, and upon which we do not pass."

See, besides cases cited by the court, *Central Trust Co. v. Continental Trust Co.*, 86 Fed. Rep. 517 (C. C. A.); *Link Belt Machinery Co. v. Hughes*, 174 Ill. 155. — Ed.

FOSDICK v. SCHALL.

1878. 99 *United States*, 235.¹

SCHALL leased cars to the Chicago, Danville and Vincennes Railroad. Subsequently Fosdick and Fish, as trustees of a mortgage of the railroad to secure bonds, filed a bill for foreclosure of the mortgage. A receiver was appointed and the road operated for some time. During this time Schall was paid an agreed rental by the receiver under direction of the court. The railroad was subsequently sold under decree of court and the cars returned to Schall. He then filed a petition praying that he be paid rental for a period prior to the appointment of the receiver, during which he had not been paid any rental. The Circuit Court for the Northern District of Illinois allowed this claim, directing the payment of \$14,568.75 to Schall. It did not appear from the record that there were any funds in court to the credit of the cause except such as arose from the sale of the mortgaged property. Fosdick and Fish and certain bondholders appealed from this order.

Mr. Henry Crawford and Mr. Ashbel Green, for the appellant.

Mr. R. Biddle Roberts, contra.

MR. CHIEF JUSTICE WAITE.

We have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court in the exercise of a sound judicial discretion may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgagees and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation.

The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embar-

¹ Statement abridged. Arguments and portion of opinion omitted.

passed, it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control. *Galveston Railroad v. Coudrey*, 11 Wall. 459; *Gilman et al. v. Illinois & Mississippi Telegraph Co.*, 91 U. S. 603; *American Bridge Co. v. Heidelberg*, 94 id. 798.

The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the Chancellor should so mould his order that while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied.

We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of

funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not unfrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court, without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the Chancellor when he comes to act. The power rests upon the fact that, in the administration of the affairs of the company, the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion. If in the exercise of this power errors are committed, they, like others, are open to correction on appeal. All depends upon a proper application of well-settled rules of equity jurisprudence to the facts of the case, as established by the evidence.

In this case no special conditions were attached to the order appointing a receiver in the Circuit Court of the United States; and it is not contended that the intervener has brought himself within the

rule fixed by the state court, in respect to the payment of general creditors. He asks to be paid a rent for his cars; but he entered into no express contract with the company which requires such a payment, and there is nowhere to be found any proof of an implied obligation to make such compensation. Two years and more before the appointment of a receiver by the state court, he contracted to sell his cars to the company at an agreed price, payable in instalments, secured by what was in legal effect a paramount lien upon the cars. Payments were made according to the contract until October, 1874, when they stopped. The cars remained in use after that, not under a new contract of lease, but under the old contract of sale. The price agreed upon not having been paid in full, the power of reclamation, which was reserved, has been exercised and sustained. The cars were not included in what was sold at the foreclosure sale, and consequently have contributed nothing directly to the fund now in court for distribution. So far as appears, no moneys growing out of the receivership remain to be applied on the bonded debt; and, if there did, through the rent already paid by receiver Anderson, full compensation has been made for all additions to that fund by means of the use of the cars. There is nothing to show that the current income of the receivership or of the company has been in any manner employed so as to deprive this creditor of any of his equitable rights. In short, as the case stands, no equitable claim whatever has been established upon the fund in court. *Prima facie* that fund belongs to the mortgage creditors, and the presumption which thus arises has not been overcome. Schall, for the balance, his due, after his own security has been exhausted, occupies the position of a general creditor only.¹

¹ The case of *Fosdick v. Schall* was the first case clearly to announce that not only might expenses of a receivership be paid out of the proceeds of mortgaged property in the hands of the receiver, in preference to the claims of the mortgagee, but that unsecured creditors whose claims arose prior to the receivership might also under some circumstances be likewise preferred. The doctrine has been frequently followed in railroad receiverships, and creditors for labor or supplies furnished within ninety days or six months before the appointment of a receiver have frequently if not generally been allowed a preferred claim. See *Huidekoper v. Locomotive Works*, 99 U. S. 258; *Hale v. Frost*, 99 U. S. 389; *Miltenberger v. Railway Co.*, 106 U. S. 286; *Trust Co. v. Souther*, 107 U. S. 591; *Burnham v. Bowen*, 111 U. S. 776; *Union Trust Co. v. Illinois Railway Co.*, 117 U. S. 434; *Union Trust Co. v. Manning*, 125 U. S. 591; *St. Louis, &c., Railroad v. Cleveland, &c., Railway*, 125 U. S. 658; *Kneeland v. American L. & T. Co.*, 136 U. S. 89; *Railroad Co. v. Wilson*, 138 U. S. 501; *Thomas v. Western Car Co.*, 149 U. S. 95; *Virginia, &c., Coal Co. v. Central Railroad Co.*, 170 U. S. 355; *Southern Railway Co. v. Carnegie Steel Co.*, 176 U. S. 257; *International Trust Co. v. T. B. Townsend Co.*, 95 Fed. Rep. 850 (C. C. A.); *First Nat. Bank v. Ewing*, 103 Fed. Rep. 168. — ED.

SIMONTON, J., IN BALTIMORE BUILDING & LOAN ASSOCIATION v. ALDERSON.

1898. 90 *Federal Reporter*, 142 (C. C. A.).

THE question then arises as to the priority in lien of the receiver's certificates over all the other liens. The Loch Lynn Heights Hotel Company is a private corporation, in no wise of a public or *quasi* public character, — a purely private concern. The bill is filed by a stockholder, who is also a simple-contract creditor. Because of the peculiar nature of the duties of a railroad corporation, — especially of the interest which the public has in keeping it a going concern, — receiver's certificates are sanctioned in railroad receiverships. The power of the court to issue them has been established beyond question. *Wallace v. Loomis*, 97 U. S. 162; *Fosdick v. Schall*, 99 U. S. 254; *Mercantile Trust Co. v. Kanawha & O. Ry. Co.*, 7 C. C. A. 3, 58 Fed. 6. But the principles upon which this doctrine rests have no application whatever to private enterprises which owe no duty to the public. In the case of private corporations the court cannot authorize the issue of receiver's certificates for the purpose of improving, adding to, or carrying on the business of the company, without first having the consent of the creditors whose liens would be affected thereby. *Farmers' Loan & Trust Co. v. Grape Creek Coal Co.*, 50 Fed. 481. In *Raht v. Attrill*, 106 N. Y. 423, 13 N. E. 282, the precise question which is now under discussion came up and was decided. An hotel company mortgaged its property to raise funds to build an hotel. Before completion, the corporation became insolvent, and upon the application of its principal stockholders a receiver was appointed; and upon an application and showing that the wages of the men who worked on the hotel building were unpaid, and they threatened, unless paid, to burn the building, the court made an order authorizing the receiver to issue certificates, which were declared to be a lien prior to the first mortgage, to raise funds to pay the wages of the laborers. After an exhaustive discussion, the court held that these certificates, issued without the consent of the prior lienholders, did not displace their lien. The same question came before the Circuit Court of Appeals of the Eighth Circuit in *Hanna v. Trust Co.*, 36 U. S. App. 62, 16 C. C. A. 586, and 70 Fed. 2, and the same conclusion was emphasized and enforced. See, also, *Hooper v. Trust Co.*, 81 Md. 559, 32 Atl. 505. From this point of view, the mortgage held by the Baltimore Building & Loan Association, and the lien of the holders of the mechanics' liens, are not subject to the prior lien of the receiver's certificates.¹

¹ *Hooper v. Central Trust Co.*, 81 Md. 559, 591, accord. See also *Makeel v. Hotchkiss*, 190 Ill. 311.

Dremen v. Mercantile Trust Co., 115 Ala. 592, contra. — ED.

HURD v. CITY OF ELIZABETH.

1879. 41 *New Jersey Law*, 1.¹

THE plaintiff brought this suit in his character of receiver of the Third Avenue Savings Bank. The declaration alleged his appointment by the Supreme Court of New York and in the form of common counts showed money due to the Savings Bank antecedently to the receivership. The defendant demurred.

For the demurrant, *R. E. Chetwood*.

Contra, Magie & Cross.

The opinion of the court was delivered by

BEASLEY, CHIEF JUSTICE. The plaintiff's right to stand as the actor in this suit is derived wholly from the receivership that was conferred upon him by the Supreme Court of the State of New York; and on the part of the defendant such right is contested, on the ground that it is contrary to established rules for the courts here to lend their assistance in carrying into effect an office created in the course of a proceeding before a foreign tribunal. To countenance this contention various authorities are cited, and notably among them that of *Booth v. Clark*, 17 How. 322. But that case belongs to a train of decisions which have been undoubtedly rightly decided, but which are not to be regarded as ruling the precise point now in issue. The decisions thus referred to will be found in *High on Receivers*, § 239, and they are all cases involving a controversy between the receiver and the creditors of the person whose property has been placed under the control of such receiver. In such a posture of things it is manifest that different considerations should have force from those that are to control when the litigation does not involve the rights of creditors in opposition to the claims of the receiver. That the officer of a foreign court should not be permitted, as against the claims of creditors resident here, to remove from this State the assets of the debtor, is a proposition that appears to be asserted by all the decisions; but that, similarly, he should not be permitted to remove such assets when creditors are not so interested, is quite a different affair, and it may, perhaps, be safely said that this latter doctrine has no direct authority in its favor. There are certainly *dicta* that go even to that extent, so that text-writers seem to have felt themselves warranted in declaring that the powers of an officer of this kind are strictly circumscribed by the jurisdictional limits of the tribunal from which he derives his existence, and that he will not be recognized as a suitor outside of such limits. But I think the more correct definition of the legal rule would be that a receiver cannot sue, or otherwise exercise his functions, in a foreign jurisdiction whenever such acts, if sanctioned, would interfere with

¹ Statement abridged. Part of opinion omitted. — Ed.

the policy established by law in such foreign jurisdiction. There seems to be no reason why this should not be the accepted principle. When there are no persons interested but the litigants in a foreign jurisdiction, and it becomes expedient, in the progress of such suit, that the property of one of them, wherever it may be situated, should be brought in and subjected to such proceeding, I can think of no objection against allowing such a power to be exercised. It could not be exercised in a foreign jurisdiction to the disadvantage of creditors resident there, because it is the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied. But beyond this precaution, why should any restraint be put upon the foreign procedure? The question thus raised has nothing to do with that other inquiry that is frequently discussed in the books, whether a receiver at common law is in point of fact clothed with the power to sue in a foreign jurisdiction; that is a subject standing by itself, for the present argument relates to a case in which the officer is authorized, so far as such power can be given by the tribunal appointing him, to gather in the assets, both at home and abroad. Conceding that the officer is invested with this fulness of authority, it would appear to be in harmony with those legal principles by which the intercourse of foreign states is regulated for every government, when its tribunals are appealed to, to render every assistance in its power in furtherance of the execution of such authority, except in those cases when, by so doing, its own policy would be displaced or the rights of its own citizens invaded or impaired. After completely protecting its own citizens and laws, the dictates of international comity would seem to require that the officer of the foreign tribunal should be acknowledged and aided. The appointment of a receiver, with full powers to collect the property of a litigant, wherever the same might be found, should be deemed to operate as an assignment of such property to be enforced everywhere, subject to the exception just defined. Such a rule is, I think, both practicable and just. If A, being the only creditor of B, should sue him in a court of this State, and the exigencies of justice should require that the property of B, wherever the same might be situated, should be put under the control of the *forum* in which the proceedings were pending, and such receiver should be appointed and should be legally clothed with the requisite authority to sue for and take possession of such property, I can find nothing in the rules of law or of good policy that should permit the debtors of B to set up that such judgment has no extra-territorial force. To sanction such a plea would be to frustrate, as far as possible, the foreign procedure, simply for the purpose of doing so, the single result being that a court would be baffled, and perhaps prevented from doing justice. Such ought not to be the legal attitude of governments towards each other. To the extent to which this subject has been involved, it has, I think, been properly disposed of in

the adjudications already made in this state. Thus in *Varnum v. Camp*, 1 Green, 326, it was decided that an instrument efficient at the domicile of the maker to transfer his property could not dispose, in a manner inconsistent with the policy of our laws, of his movables situate here. In this case the duty of comity was admitted, but the decision was put upon the ground that this state was not required, by force of such duty, to abandon an established policy of its own in favor of a different policy prevalent in another jurisdiction. *Moore v. Bonnell*, 2 Vroom 90, was decided on a similar principle, and it has this additional feature, that while it in a general way rejects the control of the foreign policy, it does this only to the extent rendered necessary for the purpose of self-protection, for, beyond this limit, it gives effect to and enforces the foreign law. And the same disposition to coöperate, as far as practicable, in sustaining an alien policy is exhibited in the case of *Normand's Administrator v. Grognaard*, 2 C. E. Green, 425. The foregoing view will be found to be in accord with the following cases: *Hoyt v. Thompson*, 1 Seld. 320; *Runk v. St. John*, 29 Barb. 585; *Taylor v. Columbia Insurance Co.*, 14 Allen, 353.

In view of these considerations and authorities, my conclusion is, that the legal effect of the appointment of a receiver in a foreign jurisdiction in transferring to him the right to collect the property passing under his control by virtue of such office, will be so far recognized by the courts of this state as to enable such officer to sustain a suit for the recovery of such property.

CHAPTER XXXI.
FOREIGN CORPORATIONS.¹

BANK OF AUGUSTA *v.* EARLE.

1839. 13 *Peters (U. S.)*, 519.

TANEY, C. J.² The questions presented to the court arise upon a case stated in the Circuit Court in the following words : —

“The defendant defends this action upon the following facts, that are admitted by the plaintiffs: that plaintiffs are a corporation, incorporated by an act of the legislature of the State of Georgia, and have power usually conferred upon banking institutions, such as to purchase bills of exchange, etc. That the bill sued on was made and indorsed, for the purpose of being discounted by Thomas M’Gran, the agent of said bank, who had funds of the plaintiffs in his hands for the purpose of purchasing bills, which funds were derived from bills and notes discounted in Georgia by said plaintiffs, and payable in Mobile; and the said M’Gran, agent as aforesaid, did so discount and purchase the said bill sued on, in the city of Mobile, State aforesaid, for the benefit of said bank, and with their funds, and to remit said funds to the said plaintiffs.

“If the court shall say that the facts constitute a defence to this action, judgment will be given for the defendant, otherwise for plaintiffs, for the amount of the bill, damages, interest, and cost; either party to have the right of appeal or writ of error to the Supreme Court upon this statement of facts, and the judgment thereon.”

Upon this statement of facts the court gave judgment for the defendant; being of opinion that a bank incorporated by the laws of Georgia, with a power among other things to purchase bills of exchange, could not lawfully exercise that power in the State of Alabama; and that the contract for this bill was therefore void, and did not bind the parties to the payment of the money.

It will at once be seen that the questions brought here for decision are of a very grave character, and they have received from the court

¹ This chapter has been prepared by Prof. Beale.

² Part of the opinion of the court only is given. M’KINLEY, J., delivered a dissenting opinion. — Ed.

an attentive examination. A multitude of corporations for various purposes have been chartered by the several States; a large portion of certain branches of business has been transacted by incorporated companies, or through their agency; and contracts to a very great amount have undoubtedly been made by different corporations out of the jurisdiction of the particular State by which they were created. In deciding the case before us, we in effect determine whether these numerous contracts are valid or not. And if, as has been argued at the bar, a corporation, from its nature and character, is incapable of making such contracts; or if they are inconsistent with the rights and sovereignty of the States in which they are made, they cannot be enforced in the courts of justice.

Much of the argument has turned on the nature and extent of the powers which belong to the artificial being called a corporation and the rules of law by which they are to be measured. On the part of the plaintiff in error, it has been contended that a corporation composed of citizens of other States are entitled to the benefit of that provision in the Constitution of the United States which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" that the court should look behind the act of incorporation, and see who are the members of it; and, if in this case it should appear that the corporation of the Bank of Augusta consists altogether of citizens of the State of Georgia, that such citizens are entitled to the privileges and immunities of citizens in the State of Alabama; and as the citizens of Alabama may unquestionably purchase bills of exchange in that State, it is insisted that the members of this corporation are entitled to the same privilege, and cannot be deprived of it even by express provisions in the constitution or laws of the State. The case of the *Bank of the United States v. Deveau*, 5 Cranch, 61, is relied on to support that position.

It is true, that in the case referred to, this court decided that in a question of jurisdiction they might look to the character of the persons composing a corporation; and if it appeared that they were citizens of another State, and the fact was set forth by proper averments, the corporation might sue in its corporate name in the courts of the United States. But in that case the court confined its decision, in express terms, to a question of jurisdiction; to a right to sue; and evidently went even so far with some hesitation. We fully assent to the propriety of that decision; and it has ever since been recognized as authority in this court. But the principle has never been extended any farther than it was carried in that case; and has never been supposed to extend to contracts made by a corporation, especially in another sovereignty. If it were held to embrace contracts, and that the members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in matters of contract, it is very clear that

they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation; and he might be sued for them, in any State in which he might happen to be found. The clause of the Constitution referred to certainly never intended to give to the citizens of each State the privileges of citizens in the several States, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the State. This would be to give the citizens of other States far higher and greater privileges than are enjoyed by the citizens of the State itself. Besides, it would deprive every State of all control over the extent of corporate franchises proper to be granted in the State; and corporations would be chartered in one to carry on their operations in another. It is impossible upon any sound principle to give such a construction to the article in question. Whenever a corporation makes a contract, it is the contract of the legal entity, of the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a State; and we now proceed to inquire what rights the plaintiffs in error, a corporation created by Georgia, could lawfully exercise in another State; and whether the purchase of the bill of exchange on which this suit is brought was a valid contract, and obligatory on the parties.

The nature and character of a corporation created by a statute, and the extent of the powers which it may lawfully exercise, have upon several occasions been under consideration in this court.

In the case of *Head and Amory v. The Providence Insurance Company*, 2 Cranch, 127, Chief Justice Marshall, in delivering the opinion of the court, said, "Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.

"To this source of its being, then, we must recur to ascertain its powers; and to determine whether it can complete a contract by such communications as are in this record."

In the case of *Dartmouth College v. Woodward*, 4 Wheat. 636, the same principle was again decided by the court. "A corporation," said the court, "is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."

And in the case of the *Bank of the United States v. Dandridge*, 12 Wheat. 64, where the questions in relation to the powers of corporations and their mode of action were very carefully considered, the court said, "But whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation; corporations created by statute must depend both for their powers and the mode of exercising them upon the true construction of the statute itself."

It cannot be necessary to add to these authorities. And it may be safely assumed that a corporation can make no contracts, and do no acts either within or without the State which creates it, except such as are authorized by its charter; and those acts must also be done, by such officers or agents, and in such manner as the charter authorizes. And if the law creating a corporation does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the State, all contracts made by it in other States would be void.

The charter of the bank of Augusta authorizes it, in general terms, to deal in bills of exchange; and, consequently, gives it the power to purchase foreign bills as well as inland; in other words, to purchase bills payable in another State. The power thus given clothed the corporation with the right to make contracts out of the State, in so far as Georgia could confer it. For whenever it purchased a foreign bill, and forwarded it to an agent to present for acceptance, if it was honored by the drawee, the contract of acceptance was necessarily made in another State; and the general power to purchase bills without any restriction as to place, by its fair and natural import, authorized the bank to make such purchases, wherever it was found most convenient and profitable to the institution; and also to employ suitable agents for that purpose. The purchase of the bill in question was, therefore, the exercise of one of the powers which the bank possessed under its charter; and was sanctioned by the law of Georgia creating the corporation, so far as that State could authorize a corporation to exercise its powers beyond the limits of its own jurisdiction.

But it has been urged in the argument that, notwithstanding the powers thus conferred by the terms of the charter, a corporation, from the very nature of its being, can have no authority to contract out of the limits of the State; that the laws of a State can have no extraterritorial operation; and that as a corporation is the mere creature of a law of the State, it can have no existence beyond the limits in which that law operates; and that it must necessarily be incapable of making a contract in another place.

It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can

have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another. It is, indeed, a mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation of law, and has been recognized as such by the decisions of this court. It was so held in the case of *The United States v. Amedy*, 11 Wheat. 412, and in *Beaston v. The Farmer's Bank of Delaware*, 12 Peters, 135. Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place?

The corporation must, no doubt, show that the law of its creation gave it authority to make such contracts through such agents. Yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence, as an artificial person, in the State of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted by the laws of that place to exercise there the powers with which it is endowed.

Every power, however, of the description of which we are speaking, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed: whether, by the comity of nations and between these States, the corporations of one State are permitted to make contracts in another. It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and courts of justice have always expounded and executed them, according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals and to produce a friendly intercourse between the sovereignties to

which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is truly said, in Story's Conflict of Laws, p. 37, that "in the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation, which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided."

Adopting, as we do, the principle here stated, we proceed to inquire whether, by the comity of nations, foreign corporations are permitted to make contracts within their jurisdiction; and we can perceive no sufficient reason for excluding them, when they are not contrary to the known policy of the State, or injurious to its interests. It is nothing more than the admission of the existence of an artificial person created by the law of another State, and clothed with the power of making certain contracts. It is but the usual comity of recognizing the law of another State. In England, from which we have received our general principles of jurisprudence, no doubt appears to have been entertained of the right of a foreign corporation to sue in its courts; since the case *Henriquez v. The Dutch West India Company*, decided in 1729, 2 L. Raymond, 1532. And it is a matter of history, which this court are bound to notice, that corporations created in this country have been in the open practice for many years past of making contracts in England of various kinds, and to very large amounts; and we have never seen a doubt suggested there of the validity of these contracts by any court or any jurist. It is impossible to imagine that any court in the United States would refuse to execute a contract, by which an American corporation had borrowed money in England; yet if the contracts of corporations made out of the State by which they were created, are void, even contracts of that description could not be enforced.

It has, however, been supposed that the rules of comity between foreign nations do not apply to the States of this Union; that they extend to one another no other rights than those which are given by the Constitution of the United States; and that the courts of the general government are not at liberty to presume, in the absence of all legislation on the subject, that a State has adopted the comity of nations towards the other States, as a part of its jurisprudence; or that it acknowledges any rights but those which are secured by the Constitution of the United States. The court think otherwise. The intimate union of these States, as members of the same great political family, the deep and vital interests which bind them so closely together, should lead us, in the absence of proof to the contrary, to presume a greater degree of comity and friendship and kindness towards one another than we should be authorized to presume between foreign

nations. And when (as without doubt must occasionally happen) the interest or policy of any State requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. But until this is done, upon what grounds could this court refuse to administer the law of international comity between these States? They are sovereign States, and the history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent. Money is frequently borrowed in one State, by a corporation created in another. The numerous banks established by different States are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other States, and suffered to make contracts without any objection on the part of the State authorities. These usages of commerce and trade have been so general and public, and have been practised for so long a period of time, and so generally acquiesced in by the States, that the court cannot overlook them when a question like the one before us is under consideration. The silence of the state authorities, while these events are passing before them, show their assent to the ordinary laws of comity which permit a corporation to make contracts in another State. But we are not left to infer it merely from the general usages of trade and the silent acquiescence of the States. It appears from the cases cited in the argument, which it is unnecessary to recapitulate in this opinion, that it has been decided in many of the state courts, we believe in all of them when the question has arisen, that a corporation of one State may sue in the courts of another. If it may sue, why may it not make a contract? The right to sue is one of the powers which it derives from its charter. If the courts of another country take notice of its existence as a corporation, so far as to allow it to maintain a suit, and permit it to exercise that power, why should not its existence be recognized for other purposes, and the corporation permitted to exercise another power which is given to it by the same law and the same sovereignty — where the last mentioned power does not come in conflict with the interest or policy of the State? There is certainly nothing in the nature and character of a corporation which could justly lead to such a distinction; and which should extend to it the comity of suit, and refuse to it the comity of contract. If it is allowed to sue, it would of course be permitted to compromise, if it thought proper, with its debtor; to give him time; to accept something else in satisfaction; to give him a release; and to employ an attorney for itself to conduct its suit. These are all matters of contract, and yet are so intimately connected with the right to sue, that the latter could not be effectually exercised if the former were denied.

We turn in the next place to the legislation of the States.

So far as any of them have acted on this subject, it is evident that they have regarded the comity of contract, as well as the comity

of suit, to be a part of the law of the State, unless restricted by statute. . . .

We think it is well settled that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union. The public, and well known and long continued usages of trade, the general acquiescence of the States, the particular legislation of some of them, as well as the legislation of Congress, all concur in proving the truth of this proposition.

But we have already said that this comity is presumed from the silent acquiescence of the State. Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made. And it remains to inquire whether there is anything in the constitution or laws of Alabama from which this court would be justified in concluding that the purchase of the bill in question was contrary to its policy.¹ . . .

When a court is called on to declare contracts thus made to be void upon the ground that they conflict with the policy of the State, the line of that policy should be very clear and distinct to justify the court in sustaining the defence. Nothing can be more vague and indefinite than that now insisted on as the policy of Alabama. It rests altogether on speculative reasoning as to her supposed interests, and is not supported by any positive legislation. There is no law of the State which attempts to define the rights of foreign corporations.

We, however, do not mean to say that there are not many subjects upon which the policy of the several States is abundantly evident, from the nature of their institutions and the general scope of their legislation, and which do not need the aid of a positive and special law to guide the decisions of the courts. When the policy of a State is thus manifest, the courts of the United States would be bound to notice it as a part of its code of laws, and to declare all contracts in the State repugnant to it to be illegal and void. Nor do we mean to say whether there may not be some rights under the Constitution of the United States which a corporation might claim under peculiar circumstances, in a State other than that in which it was chartered. The reasoning, as well as the judgment of the court, is applied to the matter before us, and we think the contracts in question were valid, and that the defence relied on by the defendants cannot be sustained.

The judgment of the Circuit Court in these cases must therefore be reversed with costs.²

¹ The learned judge here examined the legislation of Alabama and the decisions of the Supreme Court of the State, and found no reason to doubt that Alabama had adopted "the law of international comity."—ED.

² *Acc. Bateman v. Service*, 6 App. Cas. 386; *Thompson v. Waters*, 25 Mich. 214; *Merrick*

VALENTINE, J., IN LAND GRANT RAILWAY *v.* COMMISSIONERS OF COFFEY COUNTY.1870. 6 *Kansas*, 245.

THE defendants deny that the plaintiffs have any legal corporate existence in Kansas or elsewhere; and deny particularly that they have any legal right to engage in any such business in Kansas as they have engaged in on such a grand scale for the last two years.

It is certainly with no feeling of hostility towards any one that we investigate the questions. They are thrust upon us without our consent. *Van Santvoord*, 34 N. Y. 208; *Bank v. Hall*, 35 Oh. St. 158; *Canadian Pac. Ry. v. W. U. Tel. Co.*, 17 Can. 151.

A foreign corporation may be expressly forbidden by statute to do an act; as by a general statute applying to all corporations, foreign or domestic. *P. v. Howard*, 50 Mich. 239; *Bard v. Poole*, 12 N. Y. 495. So it may not do an act for doing which a special franchise is required. *Dodge v. Council Bluffs*, 57 Ia. 560; *Middle Bridge Co. v. Marks*, 26 Me. 326. So it may not do any act which is against the public policy of the State: *American Col. Soc. v. Gartrell*, 23 Ga. 448; but in the absence of legislation forbidding the act, the case must be a very clear one before the court can say that the act is against public policy. *Cowell v. Springs Co.*, 100 U. S. 59; *Stevens v. Pratt*, 101 Ill. 206; *Thompson v. Waters*, 25 Mich. 214. In the last case, CHRISTIANCY, C. J., said: "The legislature are the proper representatives of the public interest, and having the exclusive power to determine what shall be the public policy of the State, if they have chosen to make no enactment upon the subject it is natural to infer they omitted to do so because they thought it unnecessary and that the generally recognized principles would be sufficient for such cases." The fact that the legislature has itself created no corporation with power to do the act is not enough to prove that it is against public policy for a foreign corporation to do it. *Cowell v. Springs Co.*, 100 U. S. 55; *Deringer v. Deringer*, 5 Houst. 416; but see *Empire Mills v. Alston Grocery Co.*, 4 Wills. (Tex.) 346, 15 S. W. 505. In acting within the State, the foreign corporation is, of course, at all times subject to the regulations and to the general laws of the State. *U. S. v. Fox*, 94 U. S. 315; *McGregor v. Erie Ry.*, 35 N. J. L. 115; *Southern L. Ins. & Tr. Co. v. Packer*, 17 N. Y. 51; *P. v. Coleman*, 135 N. Y. 231. Since a foreign corporation may be excluded from a State altogether, it may be admitted upon terms, as, for instance, that it will submit to the jurisdiction of the local courts. *Paul v. Virginia*, 8 Wall. 168; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727.

The mere fact that the corporation was formed in the foreign State by citizens of the domestic State, to do business solely in the latter State, does not make it incapable of acting. *Bangleman v. National W. W. Co.*, 46 Fed. 4; *Lancaster v. Amsterdam Improvement Co.*, 140 N. Y. 576, *infra*; *Hanna v. International Petroleum Co.*, 23 Oh. St. 622.

The corporation can do no act which it is not empowered to do by the State of its charter; no act of the foreign State, permitting such an act to be done by the corporation within its territories, can confer the power to do it. *St. Louis V. & T. H. R. R. v. T. H. & I. R. R.*, 145 U. S. 393. As its powers are created, so the continuance of them is dependent on the will of the State of charter (subject to possible constitutional limitations). Therefore the existence of a corporation is determined solely by the law of the State of charter: *Importing and Exporting Co. v. Locke*, 50 Ala. 332; and if by that law the corporation has come to an end, it ceases to exist everywhere: *Remington v. Samana Bay Co.*, 140 Mass. 494. In that case a revolutionary government had declared the charter void. It was argued that a foreign state should not recognize the act of the revolutionary government as putting an end to the corporation; but

HOLMES, J., said: "Would it not be a most extraordinary spectacle if, when a *de facto* government . . . had made a decree dissolving a corporation, and its decree had been accepted as valid by all succeeding governments of the country having exclusive power and jurisdiction over the matter, the courts of another State should undertake to assert that the corporation existed under the laws of that country, in spite of their repudiation and denial? . . . That fiction or artificial creation is wholly within the power of its creator, and persons who deal with it must be taken to understand that it is so." — Ed.

sent. The plaintiffs bring the case here, and these questions necessarily arise in the case at the very threshold of its examination, and we could not well, if we would, escape from their investigation.

It must be admitted that the plaintiffs have been of great benefit to the people of Kansas. They have vastly increased the wealth of the State. They have expended millions of money in enterprises of incalculable benefit to the public. They have built and are building within this State, long lines of railroads, instruments of commerce and intercourse essential to the prosperity of any people, and a species of improvement without which civilization itself could no longer progress.

But let us turn to the plaintiff's Pennsylvania charter. "It is well settled that while a nation possesses an exclusive jurisdiction within its own boundaries, neither constitutions nor statutes have any intrinsic force, *ex proprio vigore*, beyond the territory of the sovereignty which enacts them, and the respect which is paid to them elsewhere depends on *comity* alone." (Sedg. on Stat. and Cons. Law, 69.) This is a maxim, self-evident, and universal in its application, applying as well between the different States of this Union as between foreign States; and needs only to be stated to be assented to. It would be absurd in the extreme to suppose that the laws of any State or country could have any force or operation beyond the boundaries of the State enacting them. "A corporation is an artificial being, invisible, intangible, and existing only in the contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." (4 Wheat. 636.) It "can have no legal existence out of the boundaries of the sovereignty by which it is created." "It exists only in contemplation of law and by force of the law; and when that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." — (13 Peters, 520, 588, 589.)

"It is a rule of law that a private corporation whose charter has been granted by one State cannot hold meetings and pass votes in another State." — (14 N. J., 380, 383.) "Corporate acts performed by the body of the corporation while sitting out of the State which creates it, are void and of no effect." — (20 Ind., 292, 297. And see 27 Me., 509, 524.)

A corporation, in order to have any legal or valid existence, must have a home, a domicile, a principal place of doing business, within the boundaries of the State which creates it. It may send agents into other States to do business, but it cannot migrate in a body. If it attempts to migrate in a body, to go beyond the jurisdiction of the laws which bind and hold it together, it dissolves into its original elements, and the persons who comprise it become only individuals. And even where a corporation has a legal and valid existence in its

own State, the only recognition that other States will give to it is such as the rules of courtesy and comity between States require.

Under the rules of comity, a foreign corporation may by its agents usually exercise in another State all the powers which it could exercise in its own State, which are not repugnant to the laws and institutions, nor prejudicial to the interests of such other State. And comity would perhaps allow a foreign corporation to exercise in another State, powers beyond what it could exercise in its own State, which were absolutely necessary to the exercise of its legitimate functions in its own State. For instance: Suppose that grapes and wine could not be produced in the State of Pennsylvania; and suppose that the State of Pennsylvania desired to charter a corporation to furnish grapes and wine from the States of New York and California to the people of the State of Pennsylvania. The States of New York and California might, through comity, allow said corporation to hold, occupy and operate vineyards in their respective States for that purpose. But this is certainly as far as any kind of courtesy or comity would go. No rule of comity will allow one State to spawn corporations, and send them forth into other States to be nurtured, and do business there, when said first mentioned State will not allow them to do business within its own boundaries.

The first section of the plaintiff's charter says that this corporation, (the New York and California Vineyard Company,) may do business any where *except in the State of Pennsylvania* — which is equivalent to saying that it shall not do business in the State of Pennsylvania; and the fourth section says that it shall establish their offices *where their business is located*, which is equivalent to saying that they shall not establish any office in the State of Pennsylvania. From the only territory in the whole world, over which the State of Pennsylvania has any jurisdiction or control, and in which it could authorize a corporation to have an office, or to do business, it excludes this corporation; and the attempt on the part of the State of Pennsylvania to authorize this corporation to have an office, or to do business anywhere else except in the State of Pennsylvania, is *ultrá vires*, illegal, and void. The truth is, that while this supposed corporation was originally organized for the whole United States, except the State of Pennsylvania, and afterwards by its amended charter of February 17th, 1870, for the whole world except Pennsylvania, it had no legal or valid existence anywhere upon the face of the earth. At the very creation of this supposed corporation its creator spurned it from the land of its birth, as illegitimate, and unworthy of a home among its kindred, and sent it forth a wanderer on foreign soil. Is the State of Kansas bound by any kind of courtesy, or comity, or friendship, or kindness to Pennsylvania, to treat this corporation better than its creator (the State of Pennsylvania) has done? It can hardly be supposed so, when we come to see how carefully our own constitution has guarded the creation of corporations in our own state.

LANCASTER v. AMSTERDAM IMPROVEMENT CO.

1894. 140 *New York*, 576.

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 13, 1893, which directed judgment in favor of plaintiff upon a case submitted under section 1279 of the Code of Civil Procedure.

This was a submission of a controversy to the General Term in the first department upon agreed facts.

The Amsterdam Improvement Company was incorporated under the laws of the state of New Jersey, in May, 1891, by five persons; of whom one only was a resident of that state, the others being residents of this state. Its certificate of incorporation, filed that day, contained the following article:—

“*Second.* That the places in this state, where the business of such company is to be conducted, are Jersey City and the city of Hoboken, in the county of Hudson. The principal part of the business of said company within this state is to be transacted at Jersey City, in the county of Hudson, and the places out of this state where the same is to be conducted and where the company proposes to carry on operations are the cities of New York and Brooklyn, in the state of New York; and that the objects for which said company is formed are the purchase and sale of real property, both improved and unimproved, the improvement of such property as may be purchased, and which, when purchased, is unimproved, the exchange of property for other property, the lending of moneys upon first and second mortgages, secured by bonds, and the purchase and sale, by assignment or otherwise, of such mortgages and bonds. The portion of the business of said company which is to be carried on out of this state in the said cities of New York and Brooklyn will be such as will come under the head of the objects for which this company is formed. The principal office or place of business of said company, out of this state, is the city of New York, in the county and state of New York.”

On December 21st, 1892, the secretary of state of the state of New York issued a certificate, of which the following is a copy:

“STATE OF NEW YORK.

“*Office of the Secretary of State, Albany.*” }

“It is hereby certified that the Amsterdam Improvement Company, which appears from the papers filed in this office on the twenty-first day of December, 1892, to be a foreign stock corporation, organized and existing under the laws of the state of New Jersey, has complied with all the requirements of law to authorize it to do business in this state, and that the business of such corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state, for such or similar business.”

The statute under which this company was incorporated provided that: "It shall be lawful for three or more persons to associate themselves into a company to carry on any kind of manufacturing, mining, chemical, trading, or agricultural business, agricultural fairs and exhibitions for the encouragement of competition in agriculture, horticulture, breed of stock, and development of speed in horses, the transportation of goods, merchandise, or passengers upon land or water, inland navigation, the building of houses, vessels, wharves, or docks, or other mechanical business, the reclamation and improvement of submerged lands, the improvement and sale of lands," etc.

This statute also provided that corporations shall have the power "To hold, purchase, and convey such real and personal property as the purposes of the corporation shall require, not exceeding the amount limited in its charter, and all other real estate which shall have been *bona fide* mortgaged to the said company by way of security, or conveyed to them in satisfaction of debts previously contracted in the course of dealings, or purchased at sales upon judgment or decree which shall be obtained for such debts."

Other provisions authorized a company organized under the statute to carry on a part of its business, and to have offices out of the state, and that "they may hold, purchase, and convey real and personal property out of the state, the same as if such real and personal property were situated in the state of New Jersey, provided that the certificate of organization shall state," etc., etc. Another provision authorized any New Jersey corporation, incorporated under any general or special act, to conduct its business outside the state.

May 23d, 1891, Arthur P. Smith was the owner of a lot of vacant and unimproved land in the city of New York, which, by a deed dated that day and duly recorded May 25th, 1891, he conveyed to the defendant. On the 15th of January, 1893, the plaintiff and the defendant entered into a written contract whereby they agreed to exchange said lot of land for another lot of land owned by the plaintiff. The land of the plaintiff was valued at \$72,000, and the land of the defendant at \$49,500, and the difference, \$18,500, the defendant agreed to pay to the plaintiff at the times and in the manner specified in the contract. It was agreed that the deeds should be exchanged at a place named on or before February 15th, 1893. Pursuant to said contract the defendant executed a deed in due form by which it assumed to convey the premises to the plaintiff.

It is conceded that the defendant has done no business in the state of New Jersey, and that the only business or transactions in which it has been engaged since its organization have been carried on in the city and county of New York.

The following question was submitted to the General Term: "Whether said defendant, the Amsterdam Improvement Company, possessed, and has conveyed to Frederick J. Lancaster, the plaintiff herein, a good and sufficient title to the premises described in said

contract and deed." That court has adjudged that the defendant's deed did not convey to the plaintiff a good title, and that its title was subject to the right, title, and interest of the people of the state, whose title was, at the time of the execution and delivery of the deed, superior and prior to that of the defendant.

Thomas P. Bassford, for plaintiff.

Louis Marshall and *Hugo S. Mack*, for defendant.¹

GRAY, J. Before approaching the discussion of the principal question in this case, certain questions of subordinate importance may be disposed of, which have been raised upon the argument. One of them relates to the right of this corporation to recognition in our courts, as affected by the fact that the incorporators are, with one exception, citizens and residents of this state. Whatever inferences can be drawn as to the motives which took them into a foreign jurisdiction to organize a corporation under its laws, I agree with the General Term that any such question has been once and for all settled by our recent decision in the case of *Demarest v. Flack* (128 N. Y. 205). It appeared in that case that citizens of this state incorporated under the laws of West Virginia to carry on a certain business, with the principal office of the company in New York city, where only it had been conducting its operations. It was claimed that these facts invalidated the corporation, and that there was a manifest evasion of, and fraud upon, the laws of the state. But it was held that they constituted no reason for refusing recognition to the corporation; that there was no essential difference between a corporation formed under the laws of a foreign state, the members of which were its own citizens, and one so formed, the members of which were citizens of our own state. If our citizens are attracted to other jurisdictions for purposes of incorporation, because of more favorable corporation or taxation laws, I cannot see in that fact, however, and in whatever sense, to be deplored, any reason that they should be prevented from employing here the corporate capital in the various channels of trade or manufacture. That, as it seems to me, would be a rather hurtful policy and one not to be attributed to the state.

Another question relates to the regularity of the proceedings for the incorporation of the defendant company under the laws of the state of New Jersey. I am unable to perceive any defect therein. I should say there had been a compliance with its statutes. But if there could be pointed out some irregularity, it could not be made the subject of an objection to the defendant's title. It was a corporation *de facto*. Its incorporators had filed their certificate of incorporation, as required by the laws of New Jersey, and a certificate had been filed in the office of the secretary of state of this state, as required by our laws of a foreign corporation. It was exercising a franchise attempted to be conferred upon it by the laws of New Jersey, and any question affecting its right to transact business, because of alleged irregularities

¹ Arguments omitted.—ED.

in organization, is a matter for the government of that state to inquire into. It was said in *Methodist Epis. Church v. Pickett* (19 N. Y. 482), with respect to the capacity of corporations to act, that "the rule established by law, as well as by reason, is that parties, recognizing the existence of corporations by dealing with them, have no right to object to any irregularity in their organization, or any subsequent abuse of their powers, not connected with such dealing. As long as they are overlooked, or tolerated by the state, it is not for individuals to call them in question." That this principle is equally applicable to foreign corporations *de facto* was held in *Bank of Toledo v. International Bank* (21 N. Y. 542). With respect to the question of whether the laws of the state of New Jersey authorize the kind of business which this company was organized and proposes to transact, I think that the provisions of the statute for the formation of corporations, to which our attention is directed, are broad enough in their scope to comprehend the objects of this incorporation. They authorize incorporations for the purpose of the improvement and sale of lands. With such an authorization and, as a corporation, being vested under those laws with the authority to hold, purchase, and convey such real and personal estate, as the purposes of the corporation shall require, there is ample support for a construction that this company may deal in the purchase and sale of real estate. But, if any doubt might be entertained upon the correctness of our construction of this foreign statute, I do not think the doubt affects the question here. If to engage in the business of buying and of selling real property is to act in excess of the powers conferred upon the corporation by the statute of New Jersey, it is for that government to inquire into the exercise by its creature of corporate powers. It is not a question which the party dealing with it can raise. As a corporation *de facto*, possessing some capacity to acquire and convey real property, its conveyance is unimpeachable upon any ground of an excess or of an abuse of powers conferred; and unless in the laws of this state we are able to find a prohibition, expressed herein, or to be implied therefrom, which disabled this corporation from acquiring the land and from conveying it, the plaintiff would obtain a valid title to the premises conveyed.

The principal question for our consideration is one of great importance; for upon its decision not only depend large interests, but a judicial definition of state policy. That question may be thus succinctly stated: Under our laws, can a foreign corporation, incorporated for the purpose of dealing in the purchase and sale of real property, come into this state and transact here such kind of corporate business? The General Term put the question in somewhat different form: Whether it may "purchase and hold lands within this state which are not necessary for its business and which have not been acquired in securing the payment due to it." That is hardly exact, as applied to the case of this corporation. As I have shaped it, the question is certainly made broad enough.

The opinion of the General Term was delivered by Mr. Justice FOLLETT, whose opinions are entitled to the highest respect, and he negatives the proposition embodied in the question; upon the ground, in substance, that from certain general statutes of this state, which relate to the right of foreign corporations to purchase, or acquire, and to convey real property, and from numerous special acts, passed to authorize them to acquire lands, it is to be inferred that "it is contrary to the policy of this state to permit such corporations to take, hold, and convey lands in this state, without being specially authorized so to do."

[The learned judge examined the statutes of the state, and held that they expressed no policy adverse to the defendant's business.]

If we turn, only, to decisions of this court, in our investigation of what has been the public policy of this state towards foreign corporations, we find them interpreting and applying the principle of state comity in the broadest spirit. In *People v. Fire Association* (92 N. Y. 311) it was observed that "where a state does not forbid, or its public policy, as evidenced by its laws, is not infringed, a foreign corporation may transact business within its boundaries and be entitled to the protection of its laws." In *Hollis v. Drew Seminary* (95 N. Y. 166) it was held that "unless the legislature forbids, they" (foreign corporations) "can come here as freely as natural persons and exercise here all the powers conferred upon them by their charter, subject to the limitation imposed upon natural persons, that is, they can do no acts in violation of our laws or of our public policy. But, unless prohibited by law, they can do here, within the limits of their chartered powers, precisely what domestic corporations can do." This decision was in line with the early case in this court of *Bard v. Poole* (12 N. Y. 495), in which the discussion turned upon the question of the right of a corporation of the state of Maryland to make loans, secured by mortgages upon real estate within this state. Judge DENIO said, in the opinion in that case, that "any of the states of the Union may, as this and several of the other states have done, interdict foreign corporations from performing certain single acts, or conducting a particular description of business within its jurisdiction. But, in the absence of laws of that character, or in regard to transactions not within the purview of any prohibitory law and not inconsistent with the policy of the state as indicated by the general scope of its laws or Constitution, corporations are permitted by the comity of nations to make contracts and transact business in other states than those by virtue of whose laws they were created, and to enforce those contracts, if need be, in the courts of such other states. It is, of course, implied that the contract must be one which the foreign corporation is permitted by its charter to make, and it must also be one which would be valid if made at the same place by a natural person, not a resident of that state."

It seems to me to be very clear, upon examination of our laws and

by reference to such judicial opinions, that there never was a time in the history of the state when a foreign corporation was prevented from entering its boundaries to transact any lawful business, which a non-resident natural person might have transacted here. What public policy is invaded, and what public interests are prejudiced, by extending to the foreign corporation, for the transaction of its business, the privileges and protection of the laws of our own state, even when that business involves the acquisition of and dealing in real property? If we were to consider the question simply in the light of a sound or a good policy, there are abundant reasons for holding that it is to the public advantage that our borders should be as much open for all lawful purposes to foreign corporations as to natural persons. Their advent and lawful operation cannot but tend to some advancement of our commercial interests and must advantage the commonwealth. It is the policy of the state to encourage the employment of capital here by liberal laws; upon what reasonable ground shall we recognize the natural person who comes here and refuse recognition to the foreign corporation? And how is the matter affected if the capital is employed in dealing in the acquisition and barter of lands, and not in commerce, manufacturing, or such like ways? What legal difference is there, which the state can recognize, if all the corporators happen to be residents of this state? The corporation is, nevertheless, a legal entity, endowed by a sister state with capacities and powers, and seeks our state as the field of its activity in the conduct of its business enterprise. Incorporations are, as a rule, advantageous to private and to public interests. As the business capacities of the general mass of mankind are constantly improving, associations of individuals, voluntarily combining their contributions, are able to perform works of various characters which no one person is able to accomplish. I believe that to be a well-recognized principle in political economy. But we are not to consider the question as one simply of sound or of good policy, but whether there is any known public policy which is affected. What reason is there that the courts shall condemn the business proposed to be carried on by the defendant? What vice inheres in it? The case does not fall within those which the courts have decided to be against public policy. The business is not immoral in itself. That it is not prohibited by legislation, I think I have been able to show.

In the opinion below, it is suggested that if the defendant may legally acquire and convey land in this state at pleasure, there is no limitation upon the amount which a foreign corporation may hold, except in its ability to purchase and pay. As applied to the case of this corporation, it might be a sufficient answer to say that the chartered purpose of dealing in the purchase and sale of real property rather negatives the idea of an intended accumulation of real estate holdings to any extraordinary extent. But a better answer would be that it is always within the power of the legislature to interfere and to regulate, if, by the magnitude of the business, the public interests are affected

and seem unduly threatened. Decisions of this court might be referred to, to show how far the legislative power has been deemed capable of extending in the direction of controlling a private business, on the ground that its magnitude affected the public and justified such interference.

Without prolonging the discussion, I think the General Term erred in their conclusions, and that the judgment should be reversed, and that judgment should be ordered for the defendant upon the submission, with costs.

All concur, except BARTLETT, J., not sitting.

Judgment accordingly.

SHEPLEY, J., IN MILLER v. EWER.

1827. 27 *Maine*, 509, 518.

THERE are a variety of corporations. It will only be necessary on this occasion to speak of one class of them, corporations aggregate, composed of natural persons. It is often stated in the books that such a corporation is created by its charter. This is not precisely correct. The charter only confers the power of life, or the right to come into existence, and provides the instruments by which it may become an artificial being, or acting entity. Such a corporation has been well defined to be an artificial being, invisible, intangible, and existing only in contemplation of law. The instruments provided to bring the artificial being into life and active operation are the persons named in the charter, and those who by virtue of its provisions may become associated with them. Those persons or corporators, as natural persons, have no such power. The charter confers upon them a new faculty for this purpose, — a faculty which they can have only by virtue of the law which confers it. That law is inoperative beyond the bounds of the legislative power by which it is enacted. As the corporate faculty cannot accompany the natural persons beyond the bounds of the sovereignty which confers it; and they cannot possess or exercise it there. Can have no more power there to make the artificial being act, than other persons not named or associated as corporators. Any attempt to exercise such a faculty there is merely an usurpation of authority by persons destitute of it, and acting without any legal capacity to act in that manner. It follows that all votes and proceedings of persons professing to act in the capacity of corporators, when assembled without the bounds of the sovereignty granting the charter, are wholly void.

TANEY, C. J., IN OHIO AND MISSISSIPPI RAILROAD CO. v. WHEELER.

1861. 1 *Black (U. S.)* 286, pp. 297, 298.

THE averments in the declaration would seem to imply that the plaintiffs claim to have been created a corporate body, and to have been endowed with the capacities and faculties it possesses by the co-operating legislation of the two States, and to be one and the same legal being in both States.

If this were the case, it would not affect the question of jurisdiction in this suit. But such a corporation can have no legal existence upon the principles of the common law, or under the decision of this court in the case of the *Bank of Augusta v. Earle*.

It is true, that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the States as one corporate body, exercising the same powers and fulfilling the same duties in both States. Yet it has no legal existence in either State, except by the law of the State. And neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the State or sovereignty which brings it into life and endues it with its faculties and powers. The President and Directors of the Ohio and Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a Circuit Court of the United States.

BLATCHFORD, J., IN GRAHAM v. BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

1886. 118 *United States*, 161, pp. 168-170.

THAT a meeting in one of several States of the stockholders of a corporation chartered by all those States is valid in respect to the property of the corporation in all of them, without the necessity of a repetition of the meeting in any other of those States, is, we think, a sound proposition. Whether it be or be not true that proceedings

of persons professing to act as corporators, when assembled without the bounds of the sovereignty granting the charter, are void, *Miller v. Ewer*, 27 Maine, 509, there is no principle which requires that the corporators of this consolidated corporation should meet in more than one of the States in which it has a domicil, in order to the validity of a corporate act.

It appears by the bill that the mortgagor corporation was chartered by its name, by the Legislature of Connecticut, at its May session, 1863; that thereafter acts were passed by the Legislatures of Massachusetts and Rhode Island, making it a corporation of those States; that, in August, 1863, the Southern Midland Railroad Company, having previously acquired all the franchises and property of the Boston and New York Central Railroad Company, a corporation chartered under the laws of Massachusetts, Connecticut, and New York, conveyed all its franchises and property to the Boston, Hartford and Erie Company; and that, in November, 1863, the latter company, under authority contained in acts of the legislatures of all four of the States, acquired the franchises and property of the Hartford, Providence and Fishkill Railroad Company, a corporation created under the laws of New York, Rhode Island, and Connecticut.

The Boston, Hartford and Erie Company, therefore, though made up of distinct corporations, chartered by the legislatures of different States, had a capital stock which was a unit, and only one set of shareholders, who had an interest, by virtue of their ownership of shares of such stock, in all of its property everywhere. In its organization and action, and the practical management of its property, it was one corporation, having one board of directors, though, in its relations to any State, it was a separate corporation, governed by the laws of that State as to its property therein. It, therefore, had a domicil in each State, and the corporators or shareholders could, in the absence of any statutory provision to the contrary, hold meetings and transact corporate business in any one State, so as to bind the corporation in respect to its property everywhere. *Bridge Co. v. Mayer*, 31 Ohio St. 317; *Pierce on Railroads*, 20.

PAUL v. VIRGINIA.

1868. 8 *Wallace* (U. S.), 168.

ERROR to the Supreme Court of Appeals of the State of Virginia. The case was thus:—

An act of the legislature of Virginia, passed on the 3d of February, 1866, provided that no insurance company, not incorporated under the laws of the State, should carry on its business within the State with-

out previously obtaining a license for that purpose ; and that it should not receive such license until it had deposited with the treasurer of the State bonds of a specified character, to an amount varying from thirty to fifty thousand dollars, according to the extent of the capital employed. The bonds to be deposited were to consist of six per cent. bonds of the State, or other bonds of public corporations guaranteed by the State, or bonds of individuals, residents of the State, executed for money lent or debts contracted after the passage of the act, bearing not less than six per cent. per annum interest.

A subsequent act passed during the same month declared that no person should, "without a license authorized by law, act as agent for any foreign insurance company" under a penalty of not less than \$50 nor exceeding \$500 for each offence ; and that every person offering to issue, or making any contract or policy of insurance for any company created or incorporated elsewhere than in the State, should be regarded as an agent of a foreign insurance company.

In May, 1866, Samuel Paul, a resident of the State of Virginia, was appointed the agent of several insurance companies, incorporated in the State of New York, to carry on the general business of insurance against fire ; and in pursuance of the law of Virginia, he filed with the auditor of public accounts of the State his authority from the companies to act as their agent. He then applied to the proper officer of the district for a license to act as such agent within the State, offering at the time to comply with all the requirements of the statute respecting foreign insurance companies, including a tender of the license tax, excepting the provisions requiring a deposit of bonds with the treasurer of the State, and the production to the officer of the treasurer's receipt. With these provisions neither he nor the companies represented by him complied, and on that ground alone the license was refused. Notwithstanding this refusal he undertook to act in the State as agent for the New York companies without any license, and offered to issue policies of insurance in their behalf, and in one instance did issue a policy in their name to a citizen of Virginia. For this violation of the statute he was indicted, and convicted in the circuit court of the city of Petersburg, and was sentenced to pay a fine of fifty dollars. On error to the Supreme Court of Appeals of the State, this judgment was affirmed, and the case was brought to this court under the 25th section of the Judiciary Act, the ground of the writ of error being that the judgment below was against a right set up under that clause of the Constitution of the United States, Art. iv, § 2, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States ;" and that clause, Art. i, § 8, giving to Congress power "to regulate commerce with foreign nations, and among the several States."

The corporators of the several insurance companies were at the time, and still are, citizens of New York, or of some one of the States of the Union other than Virginia. And the business of insurance was

then, and still is, a lawful business in Virginia, and might then, and still may, be carried on by all resident citizens of the State, and by insurance companies incorporated by the State, without a deposit of bonds or a deposit of any kind with any officer of the commonwealth.¹

Messrs. B. R. Curtis and J. M. Carlisle, for the plaintiff in error.

Messrs. Conway Robinson and R. Bowden, for the State of Virginia.

FIELD, J. On the trial in the court below the validity of the discriminating provisions of the statute of Virginia between her own corporations and corporations of other States was assailed. It was contended that the statute in this particular was in conflict with that clause of the Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," and the clause which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States." The same grounds are urged in this court for the reversal of the judgment.

The answer which readily occurs to the objection founded upon the first clause consists in the fact that corporations are not citizens within its meaning. The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed.

[The learned judge examined authorities in support of this proposition.]

The privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given.

Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, "It must dwell in the place of its creation, and cannot migrate to another sovereignty." The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States — a comity which is never extended where the existence of the corporation

¹ Arguments of counsel omitted. — Ed.

or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States.

If the right asserted of the foreign corporation, when composed of citizens of one State, to transact business in other States were even restricted to such business as corporations of those States were authorized to transact, it would still follow that those States would be unable to limit the number of corporations doing business therein. They could not charter a company for any purpose, however restricted, without at once opening the door to a flood of corporations from other States to engage in the same pursuits. They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the State should be limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal.

"It is impossible," to repeat the language of this court in *Bank of Augusta v. Earle*, "upon any sound principle, to give such a construction to the article in question," — a construction which would lead to results like these.

We proceed to the second objection urged to the validity of the Virginia statute, which is founded upon the commercial clause of the Constitution.

[The regulation in question was held not to be an unconstitutional regulation of commerce.]

We perceive nothing in the statute of Virginia which conflicts with the Constitution of the United States; and the judgment of the Supreme Court of Appeals of that State must, therefore, be

AFFIRMED.

RYLAND, J., IN COLUMBUS INSURANCE CO. v. WALSH.

1853. 18 *Missouri*, 229, pp. 237, 238.

IN regard to the point made by the defendant below, respecting the violation of the statute concerning foreign agencies, in not taking out license, or in not furnishing the clerk of the county court with the resolution of the board of directors, as required by said statute, this court is of opinion, that it is no defence to this action. Such failure does not make the policy void—does not disable the company to maintain an action, or render it unable to make proper defence to an action. These agencies are required to obtain a license—to pay a tax, and upon neglect or failure, the statute makes them liable to a penalty of five hundred dollars; but it does not declare contracts made by them void.

The law requires a merchant to obtain license before he can sell his merchandise, yet should he sell without license, and then sue to collect his debt, no person ever supposed the omission to obtain license would defeat his right to sue—would be a defence to his debtor. The record presents no error requiring reversal. The instructions given were legal—were proper, and those refused were properly refused; the instructions respecting agency were without any evidence. The judgment of the court below is affirmed, the other judges concurring.

WHITE, J., IN UNION MUTUAL LIFE INSURANCE CO. v. McMILLEN.

1873. 24 *Ohio State*, 67, p. 79.

THE object of the act is not to make the business of life insurance unlawful. The statute is designed for the protection of policy holders and others dealing with insurance companies. To this end, it is

made unlawful for persons to act on behalf of such companies until the provisions of the statute have been complied with. But we do not think it was intended to devolve on persons dealing with the companies the duty and risk of ascertaining whether they had complied with the statute. On the contrary it seems to have been the intention of the legislature to rely on the penalties imposed as sufficient to insure such compliance.

In re COMSTOCK.

1874. 3 *Sawyer*, 218 (*U. S. Dist. Ct., Dist. Or.*).

BEFORE DEADY, District Judge.

Objection to proof of debt. — On September 20, 1874, the Bank of British Columbia filed an amended proof of debt against the estate of C. B. Comstock & Co., for the sum of \$6,620.88. On September 26, the assignee filed an objection to such amended proof to the effect that such bank was a foreign corporation, and had never complied with Secs. 8 and 9 of the act of the State, of October 24, 1864, requiring a foreign corporation, before transacting business in this State, to appoint an attorney upon whom all process necessary to give jurisdiction over such corporations to the courts of this State, may be served.

Counsel for the bank moves to strike out the objection, because: 1. Said objection is improperly pleaded with objections "which are substantial in character." 2. The assignee is estopped to deny that the bank is a foreign corporation authorized to do business in this State, for the reason that it appears the bankrupts "so dealt and traded with it;" and 3. Said Comstock & Co. borrowed the money of the bank "which is the subject of this proof" and "thereby did acknowledge that the bank was a foreign corporation authorized under the laws of the State of Oregon to do business in said State, and therefore the assignee of said Comstock & Co. cannot now be heard to deny the same."

The first point made in support of the motion was not argued.

William H. Effinger, for the creditor, cited 2 N. B. R. 131; 2 Par. on Con. 798-9, note; 19 N. Y. 484; 3 Sandf. 170; 13 Am. L. R. N. s. 610; 14 Ind. 90.

William Strong, for the assignee, cited 13 Pet. 588; 8 Wall. 180; 2 Paine, 516; 8 Wend. 480; 11 Ohio State, 191; Potter's Dwaris on Statutes, 222; Herman on Estoppel, Secs. 540 and 571.

DEADY, J. On the argument it was admitted by counsel for the assignee, that he stood in the same relation to the matter as the bankrupts, and could not be heard to make this objection unless they could. Without expressing an opinion upon this proposition, it is assumed for the purposes of this case that such is the law.

It was also admitted that the bank is a foreign corporation, empowered by its charter to loan money and collect the same within this State, so far as the laws thereof permit.

Two questions appear to arise in the case: 1. Does the Oregon statute *prohibit* the transaction of business therein by a foreign corporation until its requirements are complied with? 2. Is the assignee estopped to show a want of compliance by the bank with the statute because the bankrupts were parties to the transaction alleged to have been done in violation of it?

The existence of the foreign corporation styled the Bank of British Columbia, is admitted by the assignee. But it is denied that such a corporation has the power to transact business in this State, except by its consent, and then only upon the terms of such consent; and it is claimed that a transaction in violation of such terms is illegal and void for want of power in the corporation.

A foreign corporation has no existence beyond the limits of the sovereignty which created it. As was said in *Bank of Augusta v. Earle*, 13 Pet. 538: "It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

Yet by the comity of nations the existence of a foreign corporation will be recognized in other countries, and if not prejudicial to their interests or repugnant to their policy it will be permitted to transact business therein. In Story's *Con. of Laws*, Sec. 38, it is said: "In the silence of any positive rule, affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests."

The doctrine is thus stated by Mr. Justice Field in *Paul v. Virginia*, 8 Wall. 181: "The corporation being the mere creature of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 'it must dwell in the place of its creation and cannot migrate to another sovereignty.' The recognition of its existence even by other States, and the enforcement of its contracts made therein depend purely upon the comity of those States — a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that *such assent may be granted upon such terms and conditions as those States may think proper to impose*. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their

citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." (See also *Lafayette M. Co. v. French*, 18 How. 407; *Ducat v. The City of Chicago*, 10 Wall. 400.)

The bank then has no power to make a contract within this State, without its permission or assent. If the State is silent on the subject, by the comity of nations, its permission is presumed, unless it would be contrary to its policy or interest. But the State has spoken on the subject and given its consent to the transaction of business within its jurisdiction by the bank, not absolutely, but upon a condition or a limitation. This condition or limitation is found in the first clause of Sec. 8 of the act aforesaid, which provides that "a foreign corporation *before* transacting business in the State, *must* duly execute and acknowledge a power of attorney and cause the same to be recorded in the county clerk's office of each county where it has a resident agent."

The State having this right to permit the bank to do business within its limits or not, with or without terms, has seen proper, for the security of its citizens, to require the execution and record of this power of attorney *before* the transaction of such business. The purpose of this requirement as disclosed in section 9 of the act, is to thereby secure the appointment of an attorney authorized to receive service of process for the bank, so as to enable the citizens or inhabitants of Oregon who may do business here with it, to sue it in the courts of the State, and thereby avoid the delay and expense which would often be tantamount to a denial of justice, of following it into the courts of the foreign jurisdiction where it was created.

It follows, of course, from these premises, that the bank had no power to contract in the State until it had complied with the terms upon which the permission to do business was granted. It was required to perform the condition *before* it transacted business. From the passage of the act of 1864 *supra*, the assent of the State which was implied by the comity of nations was expressly qualified, so as to be in effect as follows: "The bank of British Columbia is permitted to transact business in this State, but *before* doing so it *must* execute and record a power of attorney," etc.

Whilst it is manifest to the most ordinary observation that it was the intention of the Legislature to permit the transaction of business in this State by a foreign corporation only upon the terms provided in the act, yet as it contains no provision imposing a specific penalty for neglect to appoint an attorney as required, or authorizing a proceeding by the State against such corporation for illegal exercise of corporate powers therein, unless the appointment of an attorney is held to be a condition precedent to its right to do business in the State, the act is nugatory.

But it is said that this statute is directory, and therefore the acts of the foreign corporation done in disregard of it are not illegal and

void. It is the duty of a court to give effect to the intention of the Legislature as far as practicable, and such intention should be ascertained from the words used in the statute and the subject-matter to which it relates. The words of this act are certainly mandatory in form. *Before* transacting any business the corporation *must* appoint an attorney. Language could not make it plainer. The purpose of the act is apparent. As has been said, it is to secure the people of the State the right to sue the foreign corporation in the courts of the State; but unless the attorney is appointed *before* the business is transacted it will not be attained. In *Rex v. Locksdale*, 1 Burr. 447, Lord Mansfield laid down the rule that whether a statute is mandatory or not, depends upon whether the thing directed to be done is the essence of the thing required. Now the appointment of an attorney is the very essence of the thing required in this case. In fact, nothing else is required, and without this the statute would be utterly inoperative.

This act, being mandatory, is therefore a prohibition against the transaction of business by the bank in this State without first complying with its terms, and as a necessary consequence all acts done in violation of it are illegal and void. The legal effect of the act is the same as if it read: It shall be unlawful for any foreign corporation to transact business in this State before appointing an attorney, etc.

[The learned judge here examined several decisions upon illegality of contract.]

The following cases arose under statutes similar in purpose to the act of this State, and they all hold that a contract in contravention of the statute is illegal and void, unless the contrary is provided.

In *Williams v. Cheeney et al.*, 3 Gray, 222, it was held that a promissory note given for the premium of insurance to a foreign insurance company which had not complied with the statutes of Massachusetts upon that subject was void in the hands of the company. In *Jones v. Smith*, 3 Gray, 501, in a like case, it was said by the court, Metcalf, J.: "It was essential to the validity of the contract of insurance, which was the consideration of this note, that the insurance company should previously have complied with the provisions of the statutes of the commonwealth." This ruling was followed in *Roche v. Ladd et al.*, 1 Allen, 441, in which, according to the syllabus of the case, the court, Hoar, J., held that "a note given for the premium upon a policy of insurance issued in violation of St. 1856, c. 252, concerning insurance companies, is invalid." In *National M. F. I. Co. v. Pursel*, 10 Allen, 232, it was held by the court, Hoar, J., that a contract of insurance with a foreign company in violation of the following enactment: "Every foreign insurance company *before* doing business in this State, shall, in writing, appoint a citizen thereof, resident therein, a general agent, upon whom all lawful processes against the company may be served," was void. This statute is substantially the same as the Oregon act.

In the *R. S. In. Co. v. Slaughter, et al.*, 20 Ind. 520, it was held that a contract of insurance made with a foreign insurance company, contrary to the statute of Indiana, was void.

In *Cin. Mut. H. A. Co. v. Rosenthal*, 55 Ill. 90, it was held that a contract of insurance with a foreign company made in violation of the law of Illinois was void. The statute in that case provided that it should not be lawful for foreign insurance companies to do business in that State, without first procuring a certificate of authority from the auditor of the State. In the course of the opinion, the court (p. 91) say: "When the legislature prohibits an act or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise, would be to give the person or corporation, or individual, the same rights in enforcing prohibited contracts, as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate a law, it certainly withdraws a large portion of the fear that deters men from defying the law. To do so places the person who violates the law on an equal footing with those who strictly observe its requirements. That this contract is absolutely void as to the appellee, we entertain no doubt."

In this case, on behalf of the insurance company, it was contended that as the act imposed a penalty upon the agent for doing business contrary to it, it thereby appeared that the legislature did not intend to make the contract void. After disposing of this objection, the court (p. 92) say: "Had no penalty been provided, no one would have, for a moment, hesitated to say that the note was, under this law, utterly void." In the Oregon act there is no penalty, nothing but the unqualified command or prohibition, which has universally been held to render invalid all acts done contrary to it.

In *Ætna Insurance Co. v. Harvey*, 11 Wis., 395, it was held that no action could be maintained by a foreign insurance company upon a note given for a premium of insurance, where the company had neglected to comply with the statute of Wisconsin, which provided that it should not be lawful for any such company to transact business in the State without first having filed a statement of its affairs and condition with the Secretary of State. In the course of the opinion the court (page 396) say: "The sole question therefore presented in the case is as to the effect of such non-compliance upon the contract, and the note sued on. It was claimed for the plaintiff in error, that inasmuch as the statute does not say that any policy issued or note taken in violation of its provisions should be void, that therefore they should not be so held. And that the only effect of the law would be to render the agent liable to prosecution for violating it or to an action for damages. But we do not see how this position can

be sustained in view of the well-established rule of law that a contract made in violation of a statute is void, and that courts will never lend aid to its enforcement."

Upon these authorities, as well as upon the plain reason of the matter, I think there can be no doubt but that the Oregon act prohibited the making of the contract by the bank, which is here sought to be enforced, and therefore, as against it, it is illegal—unlawful—against law—and void. Is the assignee estopped to show the invalidity of this contract because the bankrupts were parties to the transaction? I do not think the authorities cited by counsel for the bank upon this question are in point. They are the *Methodist E. U. C. v. Pickett*, 19 N. Y. 484, and *Palmer v. Lawrence*, 3 Sandf., 170. In the latter case the court say: "that a defendant who has contracted with a corporation *de facto*, is never permitted to allege any defect in its organization, as affecting its capacity to contract or sue; but that all such objections, if valid are only available on behalf of the sovereign power of the State." In the former one the rule is stated thus: "The rule established by law as well as reason is, that parties recognizing the existence of corporations by dealing with them, have no right to object to any irregularity in their organization or any subsequent abuse of their powers, not connected with such dealing. As long as these are overlooked or tolerated by the State, it is not for individuals to call them in question."

In this case it is admitted that the bank is a corporation, but a foreign one. No defect or irregularity in its organization is sought to be alleged or any subsequent abuse of its powers. But on the other hand, it is alleged and shown: 1. That as to this transaction it was not a corporation at all—not even a corporation *de facto*, and was therefore utterly without power to contract with Comstock & Co. 2. That if it was a corporation existing by the comity of nations, in this State, it was by the State expressly prohibited from making this contract when and as it did, and therefore the same is illegal and void.

This foreign corporation having no power to do business in this State, except by the consent of the State, and consent having been given upon a condition precedent, which was never performed, the power to make this contract was never in the corporation. So far as it was concerned the act was *ultra vires*.

The doctrine of estoppel *in pais* has never been carried so far as to prevent a party from showing that a corporation, even if it be one *de jure*, had not the power to do a particular thing, or that it was done in violation of a statute. When, in a given case, it appears there is a corporation *de facto* acting under a law which gives power to do the act in question, the party dealing with such a corporation so as to recognize its existence, is therefore estopped from alleging any irregularities in its organization with a view of showing that such act is illegal. But where the objection is a want of power in the corpora-

tion and not a defect in its organization, the case is different. For instance, a corporation formed under the laws of Oregon for the purpose of navigating the Wallamet river would have no power to engage in the manufacture of shoes, and if it did so its acts would be illegal. No one would be estopped to allege the fact whenever it became material. To do so would only be to deny its existence as a corporation to manufacture shoes, and as to this it would be neither a corporation *de facto* nor *de jure*. Again, if such a corporation was forbidden by statute to carry Indians on its boats, it could not make or enforce a contract for that purpose, and no one would be estopped from alleging the fact in bar of an action by the corporation for the passage money.

In *Russell v. De Grand*, 15 Mass. 37, the voyage upon which the vessel was insured being an illegal one, the defendant, though a party to the agreement, was permitted to show its illegality to defeat a recovery upon it. So in the cases above cited, arising under the laws of Massachusetts, Indiana, Illinois, and Wisconsin, concerning foreign insurance companies doing business in those States, the defendants, although parties to the transactions, were allowed to show that they were contrary to law and void. The reason of the rule is apparent and satisfactory. The maintenance of the public policy of a State, as manifested by its legislation, is of much more importance than the real or purposed equities of the parties to an illegal transaction, and therefore they are not estopped to show such illegality for the purpose of preventing the enforcement of a contract in opposition to such policy. Otherwise the public law and policy would be at the mercy of individual interest and caprice.

In 2 Par. on Con., (5th ed.,) 799, it is said: "It must be obvious, however, that the doctrine of estoppel can go no further than to preclude a party from denying that he has done that which he has power to do;" and with like reason the converse of this proposition must be true—a party is not thereby precluded from denying that another has made a contract which he had no power to make or was prohibited from making, although he may have been a party to such illegal contract. In note *w* to the text of Par. on Con., *supra*, it is said: "A corporation may show its incapacity for a certain contract or course of action." "There cannot be an estoppel to show a violation of a statute, even to the prejudice of an innocent party." (*Steadman v. Duhamel*, 1 C. B. 888.) "Legal incapacity cannot be removed by fraudulent misrepresentation, nor can there be an estoppel involved in the act to which the incapacity relates, that can take away that incapacity." (*Kent v. Colman*, 39 Penn. St. 299.)

In *Lowell v. Daniels*, 2 Gray, 161, it was held that a married woman was not estopped to show that her deed, which upon its face appeared to have been made when she was *feme sole*, was in fact made when she was *covert* and therefore void. In the course of the opinion, Thomas, J. (p. 169), says: "This doctrine of estoppel *in pais* would

seem to be stated broadly enough, when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment or by silence, in effect do what could not be done by deed, would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates." To the same effect, in the case of an infant, is *Brown v. McCune*, 5 Sandf. 224. In the same way, to allow this corporation, by means of an alleged estoppel, which grows out of the very act prohibited, to indirectly do an act for which it had neither capacity nor right, would be practically to dispense with the limitation which the State has imposed upon its power of doing business therein.

On this occasion I do not wish to be understood as expressing any opinion upon the question whether this contract or transaction is void as against the assignee, or whether, in this respect, it comes within the rule laid down by Comyns, and cited with approbation in *White v. Franklin Bank*, 22 Pick. 181, which allows an action in disaffirmance of an illegal contract for the purpose of preventing "the defendant from retaining the benefit which he derived" therefrom.

The objection to the proof of debt is well taken, and the motion to strike out is denied with costs. I also suggest that this question ought to have been made by demurrer to the objection.

C. B. ROGERS & CO. v. SIMMONS.

1892. 155 *Massachusetts*, 259.

CONTRACT by a foreign corporation against a constable of the city of Boston, to recover part of the proceeds of a sale on an execution in favor of the plaintiff, as money had and received to the plaintiff's use. At the trial in the Superior Court, before Mason, C. J., the jury returned a verdict for the plaintiff, and the defendant alleged exceptions, which, so far as material, appear in the opinion.

C. Steere, for the defendant.

H. Dunham, for the plaintiff.

KNOWLTON, J. The first exception was to the refusal of the court to rule that the action could not be maintained because the plaintiff corporation failed to comply with the provisions of the St. of 1884, c. 330, which require every foreign corporation doing business in this Commonwealth to appoint the commissioner of corporations its attorney on whom service of process can be made, and also to file a copy of its charter, or certificate of incorporation, with a statement of the amount of its capital stock and the amount paid in thereon to its treasurer, before beginning to do business here. The contention is

that any business done by a foreign corporation without first filing the papers required by the statute is illegal, and that our courts will not aid such a corporation in the enforcement of contracts or the protection of alleged rights founded on such transactions.

But we are of opinion that these provisions are directory merely, and that, while a failure to comply with them subjects the officers and agents of the corporation to severe penalties, it will not invalidate its contracts, or deprive it of the right to sue in our courts. Indeed, the statute expressly declares, in § 3, that "such failure shall not affect the validity of any contract by or with such corporation"; and this provision is sufficiently expressive of the intention of the Legislature to include contracts which arise by implication of law, as well as express contracts. In *Chase's Patent Elevator Co. v. Boston Tow-Boat Co.*, 152 Mass. 428, under a statute somewhat similar, which contained no such clause, it was held that contracts made before filing the papers required by law to be filed prior to the commencement of business can be enforced; and the same doctrine must be laid down under the statute now before us.¹

ST. CLAIR v. COX.

1882. 106 *United States*, 350.

ERROR to the Circuit Court of the United States for the Eastern District of Michigan.

The facts are stated in the opinion of the court.

Mr. Charles I. Walker for the plaintiff in error.

Mr. Henry M. Duffield and *Mr. Levi T. Griffin* for the defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This action was brought by the plaintiff in the court below, to recover the amount due on two promissory notes of the defendants, each for the sum of \$2500, bearing date on the 2d of August, 1877, and payable five months after date, to the order of the Winthrop Mining Company, at the German National Bank, in Chicago, with interest at the rate of seven per cent. per annum.

To the action the defendants set up various defences, and, among others, substantially these: That the consideration of the notes had failed; that they were given, with two others of like tenor and amount, to the Winthrop Mining Company, a corporation created under the laws of Illinois, in part payment for ore and other property sold to the defendants upon a representation as to its quantity, which proved to be incorrect; that only a portion of the quantity sold was ever de-

¹ The remainder of the opinion dealt with another exception. — **ED.**

livered, and that the value of the deficiency exceeded the amount of the notes in suit; that at the commencement of the action, and before the transfer of the notes to the plaintiff, the Winthrop Mining Company was indebted to the defendants in a large sum, viz., \$10,000, upon a judgment recovered by them in the Circuit Court of Marquette County, in the State of Michigan, and that the notes were transferred to him after their maturity and dishonor, and after he had notice of the defences to them.

On the trial, evidence was given by the defendants tending to show that the plaintiff was not a *bona fide* holder of the notes for value. A certified copy of that judgment was also produced by them and offered in evidence; but on his objection that it had not been shown that the court had obtained jurisdiction of the parties, it was excluded, and to the exclusion an exception was taken. The jury found for him for the full amount claimed; and judgment having been entered thereon, the defendants brought the case here for review. The ruling of the court below in excluding the record constitutes the only error assigned.

The judgment of the Circuit Court in Michigan was rendered in an action commenced by attachment. If the plaintiffs in that action were, at its commencement, residents of the State, of which some doubt is expressed by counsel, the jurisdiction of the court, under the writ, to dispose of the property attached, cannot be doubted, so far as was necessary to satisfy their demand. No question was raised as to the validity of the judgment to that extent. The objection to it was as evidence that the amount rendered was an existing obligation or debt against the company. If the court had not acquired jurisdiction over the company, the judgment established nothing as to its liability, beyond the amount which the proceeds of the property discharged. There was no appearance of the company in the action, and judgment against it was rendered for \$6450 by default. The officer, to whom the writ of attachment was issued, returned that, by virtue of it, he had seized and attached certain specified personal property of the defendant, and had also served a copy of the writ, with a copy of the inventory of the property attached, on the defendant, "by delivering the same to Henry J. Colwell, Esq., agent of the said Winthrop Mining Company, personally, in said county."

The laws of Michigan provide for attaching property of absconding, fraudulent, and non-resident debtors and of foreign corporations. They require that the writ issued to the sheriff, or other officer by whom it is to be served, shall direct him to attach the property of the defendant, and to summon him if he be found within the county, and also to serve on him a copy of the attachment and of the inventory of the property attached. They also declare that where a copy of the writ of attachment has been personally served on the defendant, the same proceedings may be had thereon in the suit in all respects as upon the return of an original writ of summons personally served where suit is commenced by such summons. 2 Comp. Laws, 1871, sects. 6397 and 6413.

They also provide, in the chapter regulating proceedings by and against corporations, that "suits against corporations may be commenced by original writ of summons, or by declaration, in the same manner that personal actions may be commenced against individuals, and such writ, or a copy of such declaration, in any suit against a corporation, may be served on the presiding officer, the cashier, the secretary, or the treasurer thereof; or, if there be no such officer, or none can be found, such service may be made on such other officer or member of such corporation, or in such other manner as the court in which such suit is brought may direct;" and that "in suits commenced by attachment in favor of a resident of this State against any corporation created by or under the laws of any other State, government, or country, if a copy of such attachment and of the inventory of property attached shall have been personally served on any officer, member, clerk, or agent of such corporation within this State, the same proceedings shall be thereupon had, and with like effect, as in case of an attachment against a natural person, which shall have been returned served in like manner upon the defendant." 2 Comp. Laws, 1871, sects. 6544 and 6550.

The courts of the United States only regard judgments of the State courts establishing personal demands as having validity or as importing verity where they have been rendered upon personal citation of the party, or what is the same thing, of those empowered to receive process for him, or upon his voluntary appearance.

In *Pennoyer v. Neff* we had occasion to consider at length the manner in which State courts can acquire jurisdiction to render a personal judgment against non-residents which would be received as evidence in the Federal courts; and we held that personal service of citation on the party or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the court. The exceptions related to those cases where proceedings are taken in a State to determine the status of one of its citizens towards a non-resident, or where a party has agreed to accept a notification to others or service on them as citation to himself. 95 U. S. 714.

The doctrine of that case applies, in all its force, to personal judgments of State courts against foreign corporations. The courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: a corporation being an artificial being, can act only through agents, and only through them can be reached, and process must, therefore, be served upon them. In the State where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the State will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the State is passed difficulties arise; it is

not so easy to determine who represent the corporation there, and under what circumstances service on them will bind it.

Formerly it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the State by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Mr. Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his State, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and to authorize them legislation was necessary.

In *McQueen v. Middleton Manufacturing Co.*, decided in 1819, the Supreme Court of New York, in considering the question whether the law of that State authorized an attachment against the property of a foreign corporation, expressed the opinion that a foreign corporation could not be sued in the State, and gave as a reason that the process must be served on the head or principal officer within the jurisdiction of the sovereignty where the artificial body existed; observing that if the president of a bank went to New York from another State he would not represent the corporation there; and that "his functions and his character would not accompany him when he moved beyond the jurisdiction of the government under whose laws he derived this character." 16 Johns. (N. Y.) 5. The opinion thus expressed was not, perhaps, necessary to the decision of the case, but nevertheless it has been accepted as correctly stating the law. It was cited with approval by the Supreme Court of Massachusetts, in 1834, in *Peckham v. North Parish in Haverhill*, the court adding that all foreign corporations were without the jurisdiction of the process of the courts of the Commonwealth. 16 Pick. (Mass.) 274. Similar expressions of opinion are found in numerous decisions, accompanied sometimes with suggestions that the doctrine might be otherwise if the foreign corporation sent its officer to reside in the State and transact business there on its account. *Libbey v. Hodgdon*, 9 N. H. 394; *Moulin v. Trenton Insurance Co.*, 24 N. J. L. 222.

This doctrine of the exemption of a corporation from suit in a State other than that of its creation was the cause of much inconvenience, and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation, and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one State, they carry on the most extensive operations in other

States. To meet and obviate this inconvenience and injustice, the legislatures of several States interposed, and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.

All that there is in the legal residence of a corporation in the State of its creation consists in the fact that by its laws the corporators are associated together and allowed to exercise as a body certain functions, with a right of succession in its members. Its officers and agents constitute all that is visible of its existence; and they may be authorized to act for it without as well as within the State. There would seem, therefore, to be no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the States for which they are respectively appointed when it is called to legal responsibility for their transactions.

The case is unlike that of suits against individuals. They can act by themselves, and upon them process can be directly served, but a corporation can only act and be reached through agents. Serving process on its agents in other States, for matters within the sphere of their agency, is, in effect, serving process on it, as much so as if such agents resided in the State where it was created.

A corporation of one State cannot do business in another State without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose. As said by this court in *Lafayette Insurance Co. v. French*, "These conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence." 18 How. 404, 407; *Paul v. Virginia*, 8 Wall. 168.

The State may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a State permits a foreign corporation to do business within her limits, and at the same time provides

that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision of this court in *Lafayette Insurance Co. v. French*, to which we have already referred, sustains these views.

The State of Michigan permits foreign corporations to transact business within her limits. Either by express enactment, as in the case of insurance companies, or by her acquiescence, they are as free to engage in all legitimate business as corporations of her own creation. Her statutes expressly provide for suits being brought by them in her courts; and for suits by attachment being brought against them in favor of residents of the State. And in these attachment suits they authorize the service of a copy of the writ of attachment, with a copy of the inventory of the property attached, on "any officer, member, clerk, or agent of such corporation" within the State, and give to a personal service of a copy of the writ and of the inventory on one of these persons the force and effect of personal service of a summons on a defendant in suits commenced by summons.

It thus seems that a writ of foreign attachment in that State is made to serve a double purpose,—as a command to the officer to attach property of the corporation, and as a summons to the latter to appear in the suit. We do not, however, understand the laws as authorizing the service of a copy of the writ, as a summons, upon an agent of a foreign corporation, unless the corporation be engaged in business in the State, and the agent be appointed to act there. We so construe the words "agent of such corporation within this State." They do not sanction service upon an officer or agent of the corporation who resides in another State, and is only casually in the State, and not charged with any business of the corporation there. The decision in *Newell v. Great Western Railway Co.*, reported in the 19th of Michigan Reports, supports this view, although that was the case of an attempted service of a declaration as the commencement of the suit. The defendant was a Canadian corporation owning and operating a railroad from Suspension Bridge in Canada to the Detroit line at Windsor opposite Detroit, and carrying passengers in connection with the Michigan Central Railroad Company, upon tickets sold by such companies respectively. The suit was commenced in Michigan, the declaration alleging a contract by the defendant to carry the plaintiff over its road, and its violation of the contract by removing him from its cars at an intermediate station. The declaration was served upon

Joseph Price, the treasurer of the corporation, who was only casually in the State. The corporation appeared specially to object to the jurisdiction of the court, and pleaded that it was a foreign corporation, and had no place of business or agent or officer in the State, or attorney to receive service of legal process, or to appear for it; and that Joseph Price was not in the State at the time of service on him on any official business of the corporation. The plaintiff having demurred to this plea, the court held the service insufficient. "The corporate entity," said the court, "could by no possibility enter the State, and it could do nothing more in that direction than to cause itself to be represented here by its officers or agents. Such representation would, however, necessarily imply something more than the mere presence here of a person possessing, when in Canada, the relation to the company of an officer or agent. To involve the representation of the company here, the supposed representative would have to hold or enjoy in this State an actual present official or representative status. He would be required to be here as an agent or officer of the corporation, and not as an isolated individual. If he should drop the official or representative character at the frontier, if he should bring that character no further than the territorial boundary of the government to whose laws the corporate body itself, and consequently the official positions of its officers also, would be constantly indebted for existence, it could not, with propriety, be maintained that he continued to possess such character by force of our statute. Admitting, therefore, for the purpose of this suit, that in given cases the foreign corporation would be bound by service on its treasurer in Michigan, this could only be so when the treasurer, *the then official, the officer then in a manner impersonating the company, should be served.* Joseph Price was not here as the treasurer of the defendants. He did not then represent them. His act in coming was not the act of the company, nor was his remaining the business or act of any besides himself. He had no principal, and he was not an agent. He had no official status or representative character in this State" (p. 344).

According to the view thus expressed by the Supreme Court of Michigan, service upon an agent of a foreign corporation will not be deemed sufficient, unless he represents the corporation in the State. This representation implies that the corporation does business, or has business, in the State for the transaction of which it sends or appoints an agent there. If the agent occupies no representative character with respect to the business of the corporation in the State, a judgment rendered upon service on him would hardly be considered in other tribunals as possessing any probative force. In a case where similar service was made in New York upon an officer of a corporation of New Jersey accidentally in the former State, the Supreme Court of New Jersey said, that a law of another State which sanctioned such service upon an officer accidentally within its jurisdiction was "so contrary to natural justice and to the principles of inter-

national law, that the courts of other States ought not to sanction it." *Moulin v. Trenton Insurance Co.*, 24 N. J. L. 222, 234.

Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute — a member, for instance, of the foreign corporation, that is, a mere stockholder — is not a departure from the principle of natural justice mentioned in *Lafayette Insurance Co. v. French*, which forbids condemnation without citation, it is sufficient to observe that we are of opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record — either in the application of the writ, or accompanying its service, or in the pleadings or the finding of the court — that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another State, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employé, or to a particular transaction, or that his agency had ceased when the matter in suit arose.

In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that the Winthrop Mining Company was engaged in business in the State when service was made on Colwell. The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the State court, gave no information on the subject. It did not, therefore, appear even *prima facie* that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. The record was, therefore, properly excluded.

Judgment affirmed.

MADDEN v. PENN ELECTRIC LIGHT CO.

1897. 181 *Pennsylvania*, 617.

BILL in equity by stockholders against a foreign corporation alleging corporate mismanagement.

Demurrer to bill.

The averments of the bill and the grounds of the demurrer are stated in the opinion of the Supreme Court.

The court sustained the demurrer and dismissed the bill.

Error assigned was in sustaining the demurrer and in dismissing the bill.

James W. M. Newlin, for appellant. — The court had jurisdiction: *Bank v. Adams*, 1 Parsons, 534; Act of April 6, 1859, P. L. 387; *R. R. v. Harris*, 12 Wall. 81; *Lafayette Ins. Co. v. French*, 18 Howard, 405; *Morris v. Stevens*, 6 Phila. 488; *Babcock v. Schuylkill & L. V. Ry.*, 9 N. Y. Supp. 845; *Ives v. Smith*, 8 N. Y. Supp. 46; *State v. Farmer*, 7 Ohio Cir. Ct. Rep. 429; *Cleaton v. Emery*, 49 Missouri App. 345; 8 Am. & Eng. Ency. of Law, 334; *Redmond v. Hoge*, 3 Hun (N. Y.), 171.

Charles E. Morgan, Jr., with him *Francis D. Lewis*, for appellees, other than the Edison Light Co. — The court had no jurisdiction: *Morris v. Stevens*, 6 Phila. 488; *Bank of Virginia v. Adams*, 1 Parsons' Select Eq. Cas. 534; *Kansas Construction Co. v. R. R.*, 135 Mass. 34; *Wilkins v. Thorne*, 60 Md. 253; *Mining Co. v. Field*, 64 Md. 151; *Smith v. Ins. Co.*, 14 Allen, 336; *Gregory v. R. R.*, 40 N. J. Eq. 38.

Samuel B. Huey, for appellee, the Edison Electric Light Company. — Against a foreign corporation a court of equity in Pennsylvania cannot exercise jurisdiction in relation to or in connection with its internal management: *Kansas Construction Co. v. R. R.*, 135 Mass. 34; *Wilkins v. Thorne*, 60 Md. 253; *Mining Co. v. Field*, 64 Md. 151; *Gregory v. R. R.*, 40 N. J. Eq. 38; *Morris v. Stevens*, 6 Phila. 488; *Bank v. Adams*, 1 Parsons' Select Eq. Cases, 534.

OPINION BY MR. JUSTICE DEAN, July 15, 1897: —

The Penn Electric Light Company is a New Jersey corporation, with at first a capital of \$100,000, divided into shares of the par value of \$1.00 each, which was afterwards increased to \$200,000, and subsequently still further increased to \$1,000,000. The city of Philadelphia, by ordinance, granted it the right to occupy by conduits for electric lighting about thirteen miles of its streets, extending from the Delaware to the Schuylkill, and from Race to South streets, and at the same time authorized it to lease its conduits to others. In the beginning of July, 1887, the Electric Trust of Philadelphia, another of defendants, when the capital stock was as yet only \$200,000, purchased for the sum of \$160,000, a controlling interest in the stock. On the 14th of the same month, at the instance of the purchaser, the Penn Electric Light Company rented to the Edison Electric Light Company, another of defendants, the use of all its conduits for the term of forty-eight years, at the rate of fifty-five to thirty-five cents per annum for each lamp used, determined by the number of lamps used up to and over 24,000. It is not clear from the contract whether the use was exclusive. We are inclined to the opinion, the contract only excluded such other use as would materially interfere with the operations of the Edison Company.

The Penn Company had contracted a debt of \$50,000 to the Electric

Trust Company, which is being paid off at a rate of \$500 per year out of the annual rentals, but no dividends have as yet been realized by the stockholders. A minority of them, these plaintiffs, on January 7, 1896, filed this bill against defendants. They aver a fraudulent increase of the capital of the Penn Electric Light Company by defendants in the amount of \$500,000, and the issue of full paid certificates therefor to George S. Vickers for worthless patents; the issue of 100,000 shares to William Cohlman for worthless patents; that this was a fraudulent device concocted by Vickers, Cohlman, and the promoters of the company for their own personal benefit; that all the increases of capital were unlawful and fraudulent, and the certificates filed by the officers in the state of New Jersey of the vote for such increase were false; that all these facts were known to the Electric Trust and the Electric Light Company at the date of their contracts with the Penn Electric Light Company; that said contracts were dishonest attempts by said two companies to promote their own interests to the great prejudice and loss of the stockholders of the Penn Electric Light Company, of whom plaintiffs are a part, and that they, the said plaintiffs, are *bona fide* purchasers of said stock, with no knowledge of the fraudulent issue; that the Penn Electric Light Company is, and has been for years, insolvent, and has no assets except its income from the rentals of its conduits to the Edison Company, and this will not pay its fixed charges; that plaintiffs are in peril from demands of creditors of said company, and may be called upon for assessments upon the stock held by them. They therefore pray, according to an amended bill, that it be decreed: 1. That the conduits shall be used by all persons desiring to use the same, upon such terms as shall be fixed by the court. 2. That it be ordered that bids be invited by the Penn Company for the extension and use of its conduits. 3. That it be decreed the management of the Penn Company is fraudulent and collusive as to its stockholders, and that relief be afforded by the appointment of a master to enforce the prayers for relief. 4. General relief.

The defendants demurred to the bill, on the ground, that the matters complained of related wholly to the internal management of a foreign corporation, and, therefore, the jurisdiction was exclusively in the courts of New Jersey. The court below, without filing an opinion, sustained the demurrer and dismissed the bill. The plaintiff afterwards asked leave to amend the bill, leaving out the averments as to fraudulent issue of stock held by the Electric Trust, and the prayer that the Edison Company contract be cancelled. On this application, however, the court took no action; but, as the object of the amendment seems to have been to avoid the charge of multifariousness in the bill, on which the court below may have based its decree, we will here, for the purposes of review, treat the amendment as having been made, and consider only the question as to whether the relief prayed for is a matter of which a Pennsylvania court will take jurisdiction.

The Penn Electric Light Company is a New Jersey corporation created by another state, and subject to the corporation laws of that state. Its organization, corporate functions, who shall become members, what are their rights as members, are all questions for New Jersey courts, because questions of local law; therefore, they require local administration.

The contract with the Edison Company, the bill assumes, granted the exclusive use of the conduits to that company, which was not within the corporate power of the Penn Company to grant. Assuming the grant was exclusive, what was the scope of the corporate power conferred by the state of New Jersey? We must at once turn to the local law of New Jersey for answer. Next it is asked that a decree be made that bids be invited for the extension and use of its conduits; next, that the management shall be declared collusive and fraudulent, and be placed in the control of a master to be appointed by the court. This involves the corporate management of a foreign corporation by a Pennsylvania court. It seems to us it would be without warrant in either reason or authority. While visatorial and remedial powers are conferred upon our courts over corporations of this state, and they can, under certain circumstances, properly exercise these powers, as to foreign corporations it has been directly decided otherwise under the averments of this bill. In *Morris v. Stevens*, 6 Phila. 488, Justice SHARSWOOD, sitting at *nisi prius*, held that a stockholder's bill could not be maintained against a foreign corporation, mainly on the ground that to do so would lead to a conflict of jurisdiction. He refers to Judge KING's decision in *Bank v. Adams*, 1 Parsons, 534, where it was held that even a creditor's bill to compel payment of subscription to stock was not sustained; much less would a stockholder's bill lie, for the Pennsylvania resident has no right to call upon the courts of his own state to protect him from the consequences of a voluntary membership in a foreign corporation. By the very act of membership he intrusted his money to the control of an organization owing its existence to and governed by the laws of another state.

It is argued by appellant that the visible, tangible property of a foreign corporation situate within this state confers local jurisdiction and, therefore, as the conduits are in Philadelphia, our courts have jurisdiction. Without doubt, courts of equity in Pennsylvania, have, under our act of assembly of April 6, 1859, jurisdiction to enjoin unlawful acts by such corporations; to enforce performance of contracts in this state with third parties; in short, have general jurisdiction in equity; but they have no jurisdiction as to their internal management. What constitutes internal management is well defined by STONE, J., in *Mining Co. v. Field*, 64 Md. 154: "Where the act complained affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president or other officer, and is the act of the corporation, whether acting in

stockholders' meeting or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation; and in case of a foreign corporation our courts will not take jurisdiction."

Here, the plaintiffs, stockholders, accuse the corporate management of disregard of the rights of the whole body of stockholders for whom the corporation is trustee, in making unwise and reckless contracts, which depreciate and render valueless their stock. The wrong complained of is not from the violation of a contract with them, but want of fidelity to duty in their fiduciary relation springing from the nature of the organization.

In substance, the averment is that at the office of the company, in the state of New Jersey, the management, in violation of their official duty, entered into a contract to be performed in Pennsylvania, whereby the stockholders suffer. This, plainly, strikes at the internal management of the company; the existence of the wrong must be ascertained, and the remedy applied, according to the laws of the domicil.

The decree is affirmed.

[The subject of the extra-territorial enforcement of statutes imposing liability upon corporate stockholders or officers is not dealt with in the present edition.

In the first edition the chapter on "Statutory Liability" contained the following cases on this topic: *Flash v. Conn.*, 109 *U. S.*, 371; *Derrickson v. Smith*, 27 *N. J. Law* (3 *Dutcher*), 166; *Huntington v. Attrill*, *L. R.* (1893) *App. Cases*, 150; *Marshall v. Sherman*, 148 *New York*, 9.

For later cases, see: *Whitman v. National Bank of Oxford*, 176 *U. S.* 559; *Crippen v. Loughton*, 69 *New Hampshire*, 540; *Hancock National Bank v. Ellis*, 172 *Mass.* 39; *Howarth v. Lombard*, 175 *Mass.* 570. — ED.]

CHAPTER XXXII.

LEGISLATIVE CONTROL.

SECTION I.

How far Repeal, Change of Charter, or Confiscation, is prohibited by the U. S. Constitution, or by State Constitutions.

THE TRUSTEES OF DARTMOUTH COLLEGE
v. WOODWARD.

1817. (*In the State Court*), 1 *New Hampshire*, 111; also 65 *New Hampshire*, 473.

1819. (*In the U. S. Court*), 4 *Wheaton*, 518.

1817, 1819. (*In both Courts*), *Farrar's Report*.¹

THIS was an action of trover in the Superior Court of New Hampshire, by the trustees of Dartmouth College against William H. Woodward, for the College records, the original charter, the common seal, and divers books of account. Woodward was the secretary and treasurer of the trustees of Dartmouth *University*. His right to the property depended on the validity of certain Acts of the Legislature of New Hampshire purporting to amend the charter of Dartmouth College and to change its name to Dartmouth University.

¹ The decision in the State Court was reported, without the arguments of counsel, in 1 N. H. 111. The case was again reported in 65 N. H. 473 (published in 1891). The latter volume contains the arguments, and states that the case was again reported in order to preserve these arguments and render them accessible.

The decision in the U. S. Supreme Court, on a writ of error to the State Court, was reported, in the regular series, in 4 *Wheaton*, 518.

In addition to the above official publications, the arguments and decisions in both Courts are fully reported in a volume, published in 1819, edited by Timothy Farrar, and entitled: "Report of the Case of the Trustees of Dartmouth College against William H. Woodward," etc.

The statement of the case in the present volume of *Select Cases on Corporations* has been abridged from the statements and recitals in 1 N. H. 111, and 4 *Wheaton*, 518 (including statements found in the opinions of both Courts). The original charter and the various acts of the N. H. Legislature are given in full in the special verdict recited in 4 *Wheaton*, p. 519 to p. 551.

In the present publication none of the arguments are given, except a portion of the argument of Mr. Mason in the State Court.

In the Superior Court of New Hampshire the facts were agreed upon by the parties, and were afterwards put in the form of a special verdict.

The material facts were as follows : —

Prior to the chartering of Dartmouth College, Rev. Dr. Eleazer Wheelock had founded at his own expense, on his estate in Connecticut, a charity school for Indians, and had maintained it by contributions given at his solicitation. Contributions had been made and were then being solicited in England for this purpose, and funds thus given were in the hands of trustees in England, appointed by Dr. Wheelock to act in his behalf. Dr. Wheelock had made his own will, devising the existing charitable funds in trust to continue the school, and appointing trustees in America for that purpose. The proprietors of lands in the western part of New Hampshire promised to give large tracts, provided the school should be located in their section, and its benefits extended so as to include English youth as well as Indians. Dr. Wheelock, before removing the school, applied to the Crown for a charter; and the King, in 1769, granted the charter of Dartmouth College.

The charter recites, in substance, the facts above stated; ordains that there be a college erected in New Hampshire by the name of Dartmouth College, for the education of Indian and English youth; and that there shall be in said College “from henceforth and forever” a body corporate and politic, consisting of trustees of said College (“the whole number of said trustees consisting, and hereafter forever to consist, of twelve and no more”). The charter expresses the intent that the corporation shall have “perpetual succession and continuance forever.” The charter appoints Dr. Wheelock and eleven other persons as trustees. From the recitals in the preamble it is to be presumed that not less than six of the eleven were the same persons who had already been named as trustees by Dr. Wheelock in his will. Seven trustees constitute a quorum. The board of trustees fill vacancies in their own number. The usual corporate privileges and powers are conferred upon the trustees and “their successors forever.” The charter styles Dr. Wheelock “the Founder of said College,” and appoints him president.

It did not appear, and was not claimed, that the Crown or the Province made any donations, or proffered any endowment, prior to, or simultaneously with, the grant of the charter. The funds turned over to the College upon incorporation consisted entirely of the private gifts contributed by Dr. Wheelock and by other persons at his request. Lands were given to the College by Vermont in 1785 (sixteen years after the incorporation), and by New Hampshire in 1789 and 1807.

June 27, 1816, the Legislature of New Hampshire passed “An Act to amend the charter and improve the corporation of Dartmouth College.” The preamble styles Dartmouth “the college of this State.” By this Act and two later Acts of the same year, the following changes were made in regard to the College: —

1. The name is changed to "The Trustees of Dartmouth University."

2. The number of trustees is increased from twelve to twenty-one, of whom nine shall constitute a quorum. The nine new trustees are to be appointed by the Governor and Council.

3. The trustees shall have power to organize colleges in the university; also to establish an institute, and elect fellows and members thereof.

4. A board of overseers, twenty-five in number, is created; the members [except four *ex-officio* members] to be appointed by the Governor and Council. The overseers are to have power to disapprove and negative votes of the trustees relative to the appointment and removal of president, professors, and other officers; relative to salaries; and also relative to the establishment of colleges and professorships, and the erection of new college buildings.

5. Each of the two boards of trustees and overseers shall have power to suspend and remove any member of their respective boards.

The trustees of Dartmouth College refused to accept, or act under, the Acts of 1816.¹

The defendant Woodward was appointed treasurer and secretary of the trustees of Dartmouth University, at a meeting composed of two of the former trustees of Dartmouth College and the nine new trustees of Dartmouth University appointed by the Governor.

The cause was argued at May Term, 1817, in Grafton County, by *Mason* and *Smith*, for plaintiffs; and by *Sullivan*, attorney general, for defendant. It was continued *nisi* for further argument in Rockingham County. At September Term, 1817, in Rockingham County, the case was again argued by *Mason*, *Smith*, and *Webster*, for plaintiffs; and by *Sullivan*, attorney general, and *Bartlett*, for defendant.

Mason, for plaintiffs.

By the charter of 1769 a corporation is created, by the name of "The Trustees of Dartmouth College." The charter recites, that much expense and great labour had been bestowed, in erecting and supporting a charity school, which had become highly useful; and that individuals, as well in England as in this country, were disposed to make donations, for its enlargement, and more liberal endowment; and that the king, "willing to encourage the laudable and charitable design," established the corporation. Twelve persons are appointed under the name of *trustees*, to constitute the corporation, and it is expressly provided, that it shall forever thereafter consist of twelve

¹ Nine of the old board declined to accept or act under the new statutes. It was, in 1815-1816, matter of common knowledge that there was a division in the board of trustees. In 1815 the board, by a vote of eight to four, removed Rev. Dr. John Wheelock, the son of the founder, from the presidency. The general belief was that the nine new trustees, appointed by the Governor under the Act of 1816, would side with the friends of Dr. Wheelock, thus converting the minority of the old board of twelve into a majority of the new board of twenty-one. — ED.

trustees, and no more. To them is granted the right to acquire and hold real and personal estate, and to dispose of the same for the use of the college; and to appoint future trustees to fill vacancies in their board; and also to appoint the necessary officers of the college, and to assign them their duties and salaries; and to make laws and regulations for the proper government of the institution, together with all the usual powers of such corporations. "*To have and hold all and singular the privileges, advantages, liberties and immunities, and all other the premises, herein and hereby, granted and given, or which are meant, mentioned, or intended to be given and granted unto them, the said trustees of Dartmouth College, and their successors forever.*"

The first act (of 27th of June 1816) makes the twelve trustees, under the charter, and nine individuals, to be appointed by the Governour and Council, a corporation, by the name of "the trustees of Dartmouth University;" and transfers to them all "*the property, rights, powers, liberties and privileges*" of the old corporation, with power to establish *new colleges* and *an Institute*;—subject to the controul of a board, of twenty-five overseers, to be appointed by the Governour and Council.

The second act makes provision for obviating certain difficulties, which had occurred in attempting to execute the first. And the last act authorizes the defendant, who was the Plaintiffs' treasurer, to retain and hold for a certain time, all their property against their will; and subjects them to heavy penalties, should they impede or hinder the execution of the acts.

Under colour of these acts, the defendant claims to hold the property mentioned in the declaration.

The question is whether the acts are obligatory and binding on the plaintiffs; they never having accepted or assented to them.

By the necessary construction of these acts, the old corporation is abolished, if they are valid; and a new one established. The first act does, in fact, create a new corporation; and transfers to it all the property and privileges of the old. The old corporation can, in no sense, be said to continue, when its property and privileges, of every kind, are thus taken away, and transferred to another corporation. The trustees and overseers of Dartmouth University constitute a corporation, if the acts are effectual for any purpose; and that corporation is, essentially, different, from the corporation of the trustees of Dartmouth College, as established by the charter.

The two corporations are different in their corporate names; in the natural persons that compose them; in the form and manner of their organizations; and in their rights and privileges. The old corporation consists of twelve trustees; the new of twenty one trustees and twenty five overseers. In the old corporation the trustees, by filling vacancies, as they happened, appointed their own successors, and enjoyed and exercised all the privileges, granted by their charter, and were subject to no controul, but that of the law of the land. In the new corpora-

tion, the trustees, in their most important acts and doings, are subject to the controul of a board of overseers, dependent for their appointments on the Governour and Council. Subject to this controul, the new trustees have all the rights and powers of the old; and they have also other most important rights and powers, which the old trustees never had, nor claimed. Of course, new duties are incurred, correspondent to the newly granted rights.

In the first act it is provided, that "they (i. e. the new trustees) and their successors, in that capacity, *as hereby constituted*, shall respectively forever have, hold, use, exercise and enjoy all the powers, authorities, rights, property, liberties, privileges and immunities, *which have hitherto* been possessed, enjoyed and used by the trustees of Dartmouth College; — *except so far as the same may be varied or limited by the provisions of this act*. And they shall have power (among other things) to organize colleges in the University; to establish an Institute, and elect fellows and members thereof; — and to arrange, invest and employ the funds of the University." What other or more appropriate language could have been used, if the old trustees had surrendered their charter, and the legislature had intended to establish a new institution, to supply the place, and enjoy all the property and privileges of the old corporation? In an act for that purpose, terms could not have been used more significant and appropriate, than those contained in this act. They are in substance, that the corporation, *as hereby established*, shall have and enjoy all the property and rights, *which have hitherto* been held and enjoyed by the old corporation; — except so far as the same may be varied or limited by this act.

It is true, the act purports to include the old trustees, in the new corporation, but they have not accepted the act, nor consented to become members of the new corporation, and consequently they are not members. For they can neither be compelled to become members of the new corporation, against their will; nor to exercise new powers, or submit to new restrictions, in the old corporation. It was neither expected, nor desired that the old trustees should unite with the new ones. The intention doubtless was, in this indirect way to abolish the old corporation, and get rid of the trustees. The manner, in which the injury was inflicted, does not lessen the grievance.

But if it should be held, that the old corporation is not, absolutely, abolished, it could avail nothing, in support of the validity of the acts. For the legislature is no more competent to change, and essentially alter the rights of the plaintiffs, than to abolish them. And it cannot be denied, that the acts do, in many particulars, essentially, affect and alter both the corporate, and individual rights and powers of the old trustees. That alterations and new limitations are imposed is admitted, by the very terms of the first act. The new trustees are to enjoy and exercise all the property, and privileges, which had been enjoyed and exercised by the old trustees, — *except so far as the same may be varied or limited by the provisions of that act*.

Before the passing of the acts, the plaintiffs were sole owners of all the property, acquired under their charter, and were, alone, entitled to exercise all the privileges, granted by it. By the acts, others are admitted, against their will, to become joint owners with them, of the property, and to a joint participation, of all the privileges. This forcible intrusion, under pretence of joint ownership, violates the plaintiffs' rights, as essentially, as would an entire ouster.

The whole organization of the corporation is changed. — Instead of one board, consisting of twelve members, there are two boards, — one of twenty one members. — the other of twenty five. By the charter, the trustees had the right of making all suitable regulations, for the institution, subject to no appeal. By the acts, all the votes, and doings of the trustees may be negatived by the overseers; in whose appointment, the corporation has no agency.

Not only are new trustees forced in, to participate with the old ones, but new trusts, and new duties are created. — An Institute and new colleges are to be established, and the funds, acquired under the charter may be applied to their establishment and support.

The President of the College, a member of the old corporation, held his office and salary, dependent on the twelve trustees alone. The tenure of his office is changed, and he is now dependent on others, who have already attempted to remove him.

If the legislature can, at pleasure, make such alterations and changes, in the rights and privileges of the plaintiffs, it may take them away entirely. If a part may be destroyed or taken away by one act, the rest may, by another. The same power, that can do one, can do the other.

I shall contend for the plaintiffs that these acts are not obligatory :

I. Because they are not within the general scope of legislative power :

II. Because they violate certain provisions of the constitution of this State, restraining the legislative power :

III. Because they violate the constitution of the United States :

On the first point, the attempt will be to show, that the legislature would not have been competent to pass these acts, and make them binding on the plaintiffs, without their assent, even if there were no special restrictions on the power of the legislature, either in the constitution of this state, or of the United States.

Numerous instances have occurred, where it has been the duty of the courts of law, in this state, as well as in most other states of the union, to examine into the legality of the doings of their respective legislatures. And the cases, in which the courts have been obliged to declare legislative acts unconstitutional and void, are vastly more numerous, than judging from the theory of our governments, was to have been expected. As the constitutions attempt to define, with exactness, the powers granted to each department of government, it might have been expected, had not experience shown the contrary, that each department would have carefully confined itself, within its prescribed limits.

The celebrated maxim that the legislative, executive, and judicial powers of government ought to be kept separate and distinct, and be vested in different departments, was well understood and duly appreciated, at the time of forming the constitution of this state; and is recognized and adopted in the 37th article of the bill of rights. The due observance of this principle, according to the opinion of the most celebrated statesmen, and political writers, is essential to the preservation of a free government. "There can be no liberty, where the legislative and executive powers are united in the same person, or body of magistracy:" or, "if the power of judging be not separated from the legislative and executive powers."¹ Mr. Madison, speaking of this principle, says, "no political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."²

In compliance with this fundamental principle of all free governments, our constitution has erected the three departments, and given to each its proper powers.

The chief labour and difficulty has always been, to keep the legislative power; within its limits: and to protect the other departments from its encroachments. The legislature is too numerous to be restrained by considerations of individual responsibility. Confident in its influence with the people, it acts with a boldness and intrepidity, of which the other departments are incapable. This is the united opinion of the most able judges, after a critical examination of the course and tendency of our governments. "The legislative department is every where, extending the sphere of its activity, and drawing all power into its impetuous vortex." "It is against the enterprizing ambition of this department, that the people ought to indulge all their jealousy, and exhaust all their precautions."³ Mr. Hamilton on the same subject says, "we have seen, that the tendency of republican governments is to an aggrandizement of the legislative, at the expense of the other departments."⁴ "They (the legislature) have accordingly, in many instances, decided rights, which should have been left to judiciary controversy."⁵

Legislative bodies seem to consider themselves as representing, exclusively, the sovereignty of the people, and as having the right to exercise any power, that they may deem expedient, unless specially prohibited. It is often gravely contended, that the legislature, thus representing the people, is superior to the other branches of the government, and that it may, of right, exert a general controuling power over them. Such a doctrine is entirely inconsistent with that vital

¹ Montesq. Spirit of Laws, B. 11. C. 6. 1 Vol. 181.

² 47th No. of Federalist.

³ 48th No. of Federalist.

⁴ 49th No. of Federalist.

⁵ Jefferson's notes on Virginia, 195.

principle of all free governments, that the three great powers should be kept separate and independent.

This axiom requires, that each department should confine itself to the powers granted to it, and not interfere with, nor exercise those, granted to the other departments. No interference whatever ought to be permitted, except where there is, by the constitution, a plain delegation of power; as in the instance of the qualified negative, of the acts of the legislature, by the Governor. The different departments are co-ordinate, independent, and equally the depositaries of sovereign power. Each has what was delegated to it by the people, the great source of all power, and neither has more. Each of the three powers is, in its nature, sovereign, within its proper sphere of action. Within the limits, prescribed for it, the judiciary department is as substantially sovereign, as the legislative is within its limits. And the Courts of justice have as much right, to enact and promulgate new laws, as the legislature has to decide private controversies. For there is no more ground for a pretence, that power is given, by the constitution, either directly, or by inference, to the legislature to decide on matters of private right, than that power is given to the Courts, to enact general statutes. And one department, whenever it shall attempt to act, beyond the limits of its authority, is entitled to no more obedience or respect, than another would be, when making a similar attempt.

The Constitution of this State, and that of the United States, apparently jealous of the encroaching tendency of the legislative power, have not only defined it, with caution and exactness, but have also, in many instances, where from former experience, the greatest danger was apprehended, guarded it with special prohibitions. But these "parchment barriers" will have little effect, unless carefully guarded, and firmly defended by the judiciary. The powers are divided, and granted to separate and independent departments, to the end, that each may, in its turn, be checked and restrained, in any attempt to exercise powers not granted to it. To restrain the legislative department, from overleaping its boundary, the chief reliance is placed on the Judiciary.

That the Courts of law not only have the right, but are bound to entertain questions, and decide, on the constitutionality of acts of the legislature, though formerly doubted, seems to be now almost universally admitted. But an erroneous opinion still prevails, to a considerable extent, that the courts, in the discharge of this great and important duty, ought to act, not only with more than ordinary deliberation, but even with a degree of cautious timidity. The idea is, that these are dangerous subjects for Courts, and that they ought not to declare acts of the legislature unconstitutional, unless they come to their conclusion, with absolute certainty, like that of mathematical demonstration; and where the reasons are so manifest, that none can doubt. A Court of law, when examining the doings of a co-ordinate branch of the government, will always treat it with great decorum.

This is proper in itself, and necessary to preserve an harmonious understanding, between independent departments. So also, it ought to be, after the most careful deliberation only, that a proceeding of such co-ordinate branch should be pronounced void. Because the result is always important. But the examination is to be pursued with firmness, and the final decision, as in other cases, must be according to the unbiased dictate of the understanding.

An act of the legislature must, necessarily, have the sanction of the opinion of a majority of a numerous body of men. It cannot therefore be supposed, that the reasons, against the validity of such an act, will ordinarily be so plain and obvious, as to leave no manner of doubt. To require then, that Courts shall abstain from declaring acts of the legislature invalid, while a scruple of doubt remains, is nothing less, than to demand a surrender of their jurisdiction in this particular; in the due exercise of which consists the chief, if not only efficient security, for the great and fundamental principle of our free governments. Experience shows, that legislatures are in the constant habit of exerting their power to its utmost extent. They intentionally act up to the very verge of their authority; and are seldom restrained by doubts or timidity. If the Courts, fearing a conflict, adopt a course directly opposite, by abandoning their jurisdiction, and retiring, whenever a plausible ground of doubt can be suggested, the time cannot be distant, when the legislative department "will draw all power into its impetuous vortex."

The constitution of this State gives to the Legislature all legislative power, and no other, that has any relation to the matter, under consideration. If therefore the passing of the acts, in question, be not within the general scope of the legislative power, they cannot be valid.

The acts are predicated on no previous proceedings against the plaintiffs, showing any misconduct; but the attempt is, by a mere declaration of the sovereign will of the legislature, to take from the plaintiffs the whole, or a part, (and it makes no difference which) of their property and privileges; and to transfer them to others. That cannot be done by the exercise of the legislative power. That power is confined to the enacting of laws, and providing the proper ways and means for their execution, and finds there a sufficiently broad field of operation. Whenever a legislature rightfully performs other functions, it must be by virtue of special power, delegated for the purpose. A legislature can never, by virtue of its general legislative power interfere in questions of private right. A legislature within its proper sphere of action, is governed by its discretion alone; it can have no other guide. But private rights are not held by the uncertain tenure of arbitrary discretion. — "An elective despotism was not the government we fought for."¹

The security of private rights is the only valuable and important advantage, which a free government has over a despotick one. If the

¹ Jefferson's notes on Virginia, page 195.

rights of individuals must be liable to be violated by despotick power, it matters not, whether that power rests in the hands of one, or many. Numbers impose no restraint, and afford no security. Experience has shown, where all the powers of government have been united, that their being exercised by a numerous assembly, has afforded to private rights, no security against the grossest acts of violence and injustice.

The Legislature can make laws, by which private rights may become forfeited. But the Courts of justice are alone competent to adjudge and declare the forfeiture. While the legislative and judicial powers are kept separate, it can never be competent for the legislature, under any pretence whatever, to take property from one, and give it to another, or in any way infringe private rights. Were that permitted, all questions of private right might be speedily determined by legislative orders and decrees; and there would be no occasion for Courts of law.

The deciding on matters of private right appertains, plainly and manifestly, to the judiciary department. It constitutes the chief labour of Courts of justice. As then one department cannot exercise the powers belonging to another, it follows, that the legislature cannot, rightfully, assume any part of this jurisdiction, thus belonging to the judiciary department. The province of the legislature is to provide laws, and that of the Courts to decide rights, according to the laws. Were the Courts to assume the power of making the laws, by which they are to decide, their judgments would be arbitrary. Because, in making the laws, they could have no other rule than their own discretion. So when the legislature, whose right it is to make the law, assumes the power of adjudicating, the separate powers of government become united, and a despotism is created. And accordingly, it will be generally found, that where legislatures have attempted to interfere with private rights, they have decided with little or no regard to existing laws, but according to their own arbitrary discretion; or in other words, by the exercise of despotick power.

The general principle may be safely asserted, that no vested right whatever can be divested, and taken away from one, and transferred to another, by force of a legislative act, and without the agency of a Court of justice. This principle is clearly established, in the case of *Vanhorne vs. Dorsance*, 2 Dal. 304. A vested right is a right, acquired and possessed according to existing laws. Mr. Justice Ashurst calls it "a *legal right*, properly vested in a third person, or an interest *legally vested*."¹ All rights, legally acquired, are alike protected. The right to possess any peculiar privilege, or incorporeal hereditament, is entitled to the same protection, as the right of visible property. And it makes no difference, whether the property or privilege was obtained, by a grant from the State, or a private individual. The legislature cannot revoke its own grants. Thus land granted by a legislature becomes private property, and the grantee has immediately all the rights of ownership. And the agency of the legislature, in making

¹ *King vs. Amorv*, 2 T. R. 569. — 3 Dal. 391.

the grant, gives it no authority to interfere with any rights, which the grantee derives from his grant.¹ So the grant by the legislature to an individual, of a particular privilege, gives a vested right to the enjoyment of that privilege. It has been decided by the Supreme Court of the United States, that a grant, from a State, of a privilege or immunity, that certain land should be free from taxation, confers a right on the owner, which the legislature cannot infringe.² Of the same nature are grants of the privileges of keeping publick ferries, or erecting bridges and receiving certain tolls therefor, and also patents for new and useful inventions, all which create legal or vested rights, which cannot be taken away or infringed by the legislature.

If then legal rights, vested in individuals, cannot be taken away, or infringed by legislative acts, the next enquiry is whether the Plaintiffs have any such rights, which can be affected by the acts in question.

The Plaintiffs claim to have legal rights, both in their corporate, and individual capacities. In their corporate capacity, they claim the franchise of being, and continuing to be, a corporation, and the right to possess and enjoy all the privileges, granted and assured to them, by their charter; and among others, the right to the property, acquired under it. In their individual capacities, they claim the right to be members of the corporation, and to enjoy all the privileges, accruing to them from being members.

That many corporations have legal rights, and which of course cannot be abolished or infringed by the Legislature, cannot be doubted. It will not, as is believed be contended, that the Legislature can abolish incorporated Banks and insurance companies, and dispose of their property, at pleasure. Such corporations clearly have vested rights, with which the legislature cannot interfere.

There are corporations of different kinds, and with different incidents, which are all very exactly defined by law. To ascertain what are the rights of the corporation, under consideration, it must be seen, to what species or class of corporations, it belongs, and what are the incidents, and rights of that species or class.

The only division of corporations, material to the present enquiry, is that of civil and eleemosynary.

Civil corporations are constituted for the purpose of government; or for the encouragement of trade, and commerce, or such like purposes.³ Some of them may be, with propriety, and often are called publick corporations. The division of a state, into counties and towns, for the purpose of civil government, creates publick corporations. These sections or districts are organized, for the purpose of exercising certain functions of civil government. And over these, the legislature may without doubt exercise a controuling power, to a certain extent

¹ Fletcher vs. Peck, 6 Cranch, 135.

² State of New-Jersey vs. Wilson, 7 Cranch, 164.

³ 1 Wood. 482.

Other civil corporations, established for the promotion of commerce, or the more convenient management of pecuniary concerns, are private, and with them the legislature has no power to interfere.

The general division of a state into counties and towns, as is done in this, and the other states of New-England, creates corporations of a peculiar kind, having a few only of the ordinary incidents of corporations. In this State, the corporate privileges of towns, with few exceptions, are conferred and limited by general laws, extending equally to all. A town, like a county, may be established without the consent of the inhabitants, who may be compelled, against their wills, to become members of the corporation. In this, there is nothing unjust or arbitrary, as a like provision extends to all the inhabitants of the state, who must be members of some town, and County Corporation. Although the privileges of such corporations may, in a certain degree be subject to legislative controul, it by no means follows that the legislature can, rightfully, take from any such corporation its property, and transfer it to another.

Somewhat similar to these, are incorporated cities, where all within certain limits, are included, and made members of the corporation. But where there is a special grant of peculiar privileges, the legislative power to new-model, or controul them, if admitted at all, must be with great limitation. The legislature cannot abolish such corporations, or do anything equivalent to it. As far as the privileges are peculiar, and such as cannot be affected by a general law, applicable to all, it is not easy to see on what principles they can be essentially changed or altered, by a special act of the legislature. But however that may be, if the legislature have a controuling power, over such corporations, it must be, because they are created, for the purpose of civil government, and are publick corporations. And consequently if it were admitted, that such power could be exercised over these corporations, it would not follow, that it might be so exercised over corporations of a different kind, and established for different purposes.

An eleemosynary corporation is always for charitable purposes. Its designs is, to secure the applications of donations to charitable uses, according to the directions of the donors. It has no concern with the civil government of the State, either general or local; nor in the promotion of commerce, or any other branch of business, which are the objects of civil corporations. It originates in private bounty, and its privileges are granted, for the purpose of perpetuating, and securing the application of the bounty, to the objects intended. And it is always a private, in contradistinction to publick corporations. All hospitals are eleemosynary and private corporations; and with them incorporated Colleges and Schools are always classed.¹

Hospitals and colleges or schools are always classed together, and alone constitute eleemosynary corporations. Professor Wooddeson says, "all eleemosynary corporations may I believe be included, under

¹ 1 Black. 471. — 1 Kyd 25.

the name of hospitals, colleges or schools ; in respect of visitation there seems no discrimination between Colleges and Hospitals.”¹ Colleges established, for securing the means of instruction, and for the promotion of learning, are eleemosynary, and private corporations, in the same sense, that Hospitals are, which are established, for securing the means of subsistence for the sick and poor. The object of eleemosynary corporations is to execute the wills of donors. He who gives to a charity, may surely direct the uses, to which his bounty shall be applied.

A striking mark of distinction, between civil and eleemosynary corporations, is, that the former is not, and the latter is subject to visitation. There can be no private visitors of civil corporations. Their disputes are determined, and the performance of their duties enforced, in courts of law. But all eleemosynary corporations have visitors, whose right and duty it is, to enforce the due observance of the regulations of the institution. To all colleges and schools for the purpose of instruction, visitation is a necessary incident, as it is also to Hospitals. This is laid down as an acknowledged principle, by all elementary writers, and appears to be universally admitted in the cases, where the rights of such corporations were in question.”²

“ When governours are appointed, to superintend a charity, *they are in all cases visitors of the objects of the charity* ; when the application of the revenues is not immediately entrusted to them, they are also visitors, as to the application of the revenues ; and the Court of chancery has no jurisdiction over them ; but when the management of, and application of the revenues is immediately entrusted to them, then as to these they are subject to the controul of that Court.”³ This is the manner, in which the plaintiffs are incorporated. They are therefore themselves visitors of the corporation, as to the objects of the charity, and may be compelled faithfully to apply the revenues to those objects.

According to well established principles then, there can be no doubt, to which class of corporations the one in question belongs. It is clearly an eleemosynary corporation, and of consequence, a private corporation. It may be safely asserted, that not even the semblance of an authority can be produced to support a contrary opinion. It differs from civil and publick corporations, in all those particulars, which are supposed to give the legislature a right, to interfere in their concerns.

This being a private corporation, the plaintiffs have legal rights, and interests, which cannot be taken away or infringed, at the discretion of the legislature. The rights of private corporations are entitled to the same protection as the rights of individuals. A corporation is created for the purpose of securing and perpetuating rights. It is admitted

¹ 1 Wood. 474.

² Phillips vs. Bury, 1 Lord Ray. 5. — 1 Burr. 200. — 1 Black. 482.

³ 2 Kyd 195.

that corporate rights must originate, in a grant from the state; they are nevertheless legal rights. It is not pretended, that the legislature can resume its grants, to an individual, of either property or privileges. What better right has it, to resume its grants, to a private corporation, established to administer private charity? It is true, the expectation of publick benefit was the inducement, to create the corporation. And in the present case that expectation has not been disappointed. The funds have been duly applied to the objects designed, or if not, that duty can be enforced, by the Courts of Justice. The expectation of publick benefit is always the inducement for erecting corporations of every kind. Of course, if they answer the ends, for which they are established, the state derives advantages from them. But it does not follow, that all their property and privileges are held in trust for the publick, and that the legislature may dispose of them, among the other publick property, at pleasure. The state is entitled to all the benefits and advantages, stipulated for, in the grant of incorporation, and to nothing more. The state has an interest, that the property and privileges of an individual should be used, in such a manner as to be beneficial to the publick. Is the individual therefore a trustee for the publick, and may the legislature, on that ground, take his privileges, into their own hands? They have no better right to interfere, with private corporations, under pretence of their being publick trusts.

An eleemosynary corporation is the means, devised by the policy of the law, to secure the fulfilment of the will of a charitable donor. The corporation is nothing more, than the means used to obtain an object; and can the law be justly charged, with the absurdity of converting the means, it has thus devised into an engine to defeat the object? Who would found an eleemosynary corporation, or give it property, for the purpose of securing it, for a special charitable use, knowing, that he thereby, subjected his property to any use, that a legislature, under the influence of momentary passion, or prejudice, might prefer? Very different is the protection, which the law affords to property, given to charitable uses, which it guards, at all points, with the most vigilant caution. It will carry into effect devises and conveyances, for charitable uses, under circumstances, which would render them void, if for any other purpose.

The circumstance, that this state has made donations to the corporation, does not alter its nature, nor lessen or destroy the plaintiffs' rights. The state, like other donors, gave on such conditions, as it pleased; and like other donors, it can enforce the fulfilment of the conditions. The state of Vermont also made donations, and would thereby seem to have as much power, on that ground, to interfere with the concerns of the corporation, as this state has. In the case of *Terrett & al. vs. T aylor & al.* where the attempt was, by a legislative act, to take away the property of the episcopal churches, in Virginia, and apply it to other uses, Judge Story, in delivering the opinion of the Court, says, "Had the property thus acquired, been originally granted by the State,

or the King, there might have been some colour, *and it would have been but a colour, for such an extraordinary pretension.*"¹

It is impossible, without disregarding all established principles and authorities, on this subject, to consider a private eleemosynary corporation, a publick trust, and its members, publick officers of the state, and therefore incapable of having any rights, of the character of private rights.

In most eleemosynary corporations, the objects of the charity, that is those who are individually to receive the benefit of it, are admitted and constituted members of the corporation. In a hospital, incorporated on that plan, the poor and sick to enjoy the benefit of the charity, must be admitted members of the corporation. Can they be said, to hold the property and privileges of the corporation, in trust for the publick, and to be all publick officers of the state? It has never been supposed, that the rights of a corporation so constituted were, in relation to the publick, different from those of a corporation, constituted as ours is.

It is admitted, the plaintiffs are trustees of the revenues of the corporation, and bound to apply them to the objects intended to be provided for, and that this trust may be enforced against them. But this is a private, not a publick trust. So also the corporate privileges are held in trust, partly for individual members of the corporation, but chiefly for those, who, though not members, are to receive the ultimate benefit of the charity. But although the plaintiffs hold the property and privileges in trust, they are still the legal owners, and have all the legal rights thereto appertaining. When a trustee asserts, in a Court of law, his right to property, conveyed to him in trust, it is surely no sufficient answer, to tell him the property is designed for the use and benefit of others, and that he individually suffers no injury, and therefore is entitled to no remedy. The chief design, of conveying property in trust, is to constitute the trustee a legal protector of it; because the *cestui que trust* is generally incompetent. A benefit to the trustee personally is not designed.

The true principle is, that a trustee, having the legal right, is entitled to all its remedies; and Courts of justice, instead of restraining him, often compel him to exert them. Were the law otherwise, all trust property would lie at the mercy of every invader. The *cestui que trust* cannot protect it, because not the legal owner; and if the trustee may not, it is without protection. In no case is the propriety and necessity, of allowing legal protection to property, in the hands of trustees, more apparent, than in that of corporations, like the present, for charitable purposes. For it is most manifest, the charity can, in no other way, be protected. To hold the trustees, on the ground of a supposed want of interest, are incompetent to protect the subject matter of the trust, would destroy, not only all charitable corporations, where trustees are introduced, but all trusts whatever.

¹ 9 Cranch 49.

In corporations, for the promotion of commerce, or the management of mere money concerns, it is not necessary, nor always the case, that those, who contribute the funds, and participate in the profits, should be members of the corporation. Persons having no interest in the funds, may be members of the corporation, and hold them in trust for those who are entitled to the profits. The trustees, in such a corporation, would unquestionably be competent in law, to protect all its rights.

There is then no ground, for raising such an interest in the state, or such a trust for those, to be benefited by the institution, as shall defeat the plaintiffs' rights. This is a private corporation, and of that kind the most favoured in law. And it has legal rights, if any corporation can have such rights. Any principle, which can be assumed, to deprive this corporation of legal rights, will be equally applicable to every other corporation, of whatsoever kind. The most private corporation, that can be established for the purpose of trade, or the management of money concerns, can make out no better claim to legal rights. A corporation, for the most charitable and benevolent purposes, surely has, both by legal principles, and according to the common opinion of mankind, rights, as inviolable, as those of a corporation, for the purpose of commerce and traffick. If these acts of the legislature can be supported, they can pass similar acts, in relation to any and every corporation. It is then for the defendant boldly to maintain, that no corporation has legal rights; but that all their property, and pretended privileges are held, at the mercy of the legislature.

Corporations must claim all their rights, by virtue of grants from the state; but they are not, for that reason, less secure or inviolable, than similar rights of individuals, derived from the same source. Peculiar privileges, granted by the state to individuals, although intended to promote the publick interest, become vested rights, and cannot be resumed. On what ground rests the distinction between these, and similar privileges, granted to private corporations? There is no secret or implied condition, to a grant, or charter of incorporation, that it may be revoked or annulled by the legislature, whenever it pleases.

The British Parliament can, as it is held, abolish corporations. So it can pass acts of attainder, and of pains and penalties. But neither can be done, by virtue of the ordinary and legitimate legislative power, which belongs to our legislature. According to the theory of the British government, the Parliament is omnipotent. "A corporation may be dissolved by act of Parliament which is *boundless*, in its operations."¹ In modern times, however, the exercise of these extraordinary powers, which are entirely incompatible with the existence of private rights of any kind, has been seldom resorted to.

The attempt was made, by the Bill introduced into Parliament, in the year 1783, by Mr. Fox, for new modelling the charter of the East India Company. The attempt was resisted and defeated. The city of London, in their petition against the bill, assert "that it was not only

¹ 1 Black. 484.

a *high and dangerous violation* of the charters of the Company, but a total subversion of all the principles of the law and constitution of that country." Lord Thurlow termed it "a most atrocious violation of private property, which cut every Englishman to the bone." Mr. Pitt opposed it, as being "a daring violation of the chartered rights of the Company."¹ The bill did not pass. But the attempt was so strongly denounced, by public opinion, that it ruined the party, which made it. In times of the greatest excess of arbitrary power in England, resort was seldom had to this unlimited power of Parliament. The great attempt to destroy, or controul the corporations, in the reign of Charles II. was made by the oppressive use of judicial proceeding, through the servility of dependent judges. The charters of the city of London, and of the colonies of Massachusetts and Connecticut, were declared forfeited on information of *quo warranto*.

But whatever be the extent of this undefined and arbitrary power, of the British Parliament, I trust it will not be contended, that it has descended to our legislature. The taking away of the colonial charters, under colour of that power, is justly classed among the grievous oppressions, which led to our independence. "Chartered rights" were then deemed, of too sacred a nature, to be voted away, as the passions or caprice of a legislature might incline. Will it now be asserted, that the British Parliament or King, or both united, were competent to abolish, or new model the colonial Charters? If it could be done, by legislative power alone, they might, for they possessed the whole legislative power over that subject matter.

In the opinion of the Supreme Court of the United States, in the case of *Terrett & al. vs. Taylor & al.* before mentioned, it is said, "The title was indefeasibly vested in the churches, or rather in their legal agents. It was not in the power of the crown to seize or assume it, nor of the Parliament, unless by the exercise of a power the most arbitrary, oppressive, and unjust, and endured, only because it could not be resisted." "The dissolution of the form of government did not involve in it a dissolution of civil rights, or an abolition of the common law, under which the inheritances of every man in the state were held. The State itself succeeded only to the rights of the crown."² If the plaintiffs forfeited none of these rights, by the revolution in government, the legislature had no more power over their rights, than previously existed, in the hands of some depository of power. The Parliament of Great Britain had no rightful power whatever over this corporation. The legislature of this state succeeded to all the power, which the King, who granted the charter had, and to no more.

In England the creating of corporations appertains to the King, and he has all the legitimate power, that exists for dissolving them; except what is vested in the judicial Courts.³ He can institute proceedings in the Courts, and for just cause obtain a forfeiture of all corporate rights

¹ Parliamentary Register, 1783, 4.

² 9 Cranch 50.

³ 1 Black. 3. 472.

and privileges; and then regrant them, as he pleases. He may also grant charters, to old corporations, with new modifications, which, if accepted, are binding. All this may the legislature of this state do.

But the King cannot abolish a corporation, or give it a new organization, or alter any of its powers or privileges, without its consent. This is the well established, and acknowledged doctrine of the common law.¹ On the ground that the King cannot resume the grant of a corporate privilege, it is held that the grant of a franchise, already granted, is void.² The King's grants, of corporate rights, bind him, as much as his grants of land. When therefore he has granted such rights, he cannot resume and regrant them, till it has been determined by due trial, in a Court of law, that they have become forfeited.

The remedy for the King, in such case, was a writ of *quo warranto*: in place of which, in latter times, the information of *quo warranto* has been used, as being more convenient. "A writ of *quo warranto* (says Judge Blackstone) is in the nature of a writ of right, for the King against him, who claims or usurps any office, franchise, or liberty; to enquire by what authority he supports his claim, in order to determine the right. It lies also, in the case of the non-user, or long neglect of a franchise, or misuser or abuse of it." "The judgment, on a writ of *quo warranto* being in the nature of a writ of right, is final and conclusive even against the crown."³ So far then from resuming his grants of corporate rights, at pleasure, the King was obliged to try his claim, for a forfeiture, like any other person, and if the determination was against him, the corporation was secured in the quiet enjoyment of them.

Corporations forfeit their rights, by nonuser or misuser, and are to be vacated by trial and judgment.⁴ Their powers cannot be newly modified, or altered, without their consent. In case of the offer of a new charter, to an old corporation, it may be accepted or rejected, as the corporation pleases; or part may be accepted, and part rejected.⁵ "During the violent proceedings, that took place in the latter end of the reign of Charles the II., it was among other things thought expedient to new model most of the corporation towns in the kingdom; for which purpose, many of those bodies were persuaded to surrender their charters, and informations in the nature of *quo warranto* were brought against others, upon a supposed or frequently a real forfeiture of their franchises, by neglect or abuse of them."⁶ Would the King, in those violent times have taken the trouble, of resorting to the Courts of law, if it had been supposed, that he might have resumed his grants, at pleasure. There was no pretence, that he could of his own authority, and without the agency of the Courts, lawfully interfere with, or controul any of the rights of corporations.

¹ King vs. Amory, 2 T. R. 515. King vs. Pasmore, 3 T. R. 240. King vs Vice Chancellor of Cam. 3 Burr. 16. 56.

² 2 Black. 37. — 2 T. R. 509.

³ 3 Black. 262. 3. 2 Ins. 282.

⁴ Thing vs. Pasmore, 3 T. R. 244. — 9 Cranch 51.

⁵ 3 Burr. 1656. — 3 T. R. 240. 246.

⁶ 3 Black. 263.

As successors to the King, then, the legislature have no power, to pass the acts in question. And it may be safely asserted, that before the change in the form of government, the plaintiffs could not have been rightfully deprived of their property or privileges, without a trial in due course of law. Do they now hold their rights by a tenure less secure, and more subject to arbitrary controul, than they did before the revolution? If the legislature may annul or repeal grants of corporate privileges, what shall restrain them from doing the same with grants of land? What are to be the limits of this newly discovered authority? Should the royal grants of land, made before the revolution, be examined, more instances of heedless extravagance will be found, than in any grants of corporate privileges. If one may be resumed, so may the other, for they both rest on the same principles for security.

We know from experience, that the legislative power is of an encroaching nature. Permit the legislature, in this instance, to abolish a charter of corporate privileges, and there will be no ground left, on which they can be restrained, from abolishing patents or grants of land. The great principle of security, for private property, will be destroyed. And let it be remembered that the attempt to vacate legal rights and titles, vested in individuals, has, in fact, been made by the legislatures of more than one of the states, in the Union. The only means of security is to abide by settled principles, and firmly resist the first attempt at encroachment. The law affords the same security and protection, for the enjoyment of franchises or privileges, as it does for other rights. An action for a disturbance of a franchise or privilege, is well known in law, and may be as easily maintained, either by an individual, or a corporation, as for any other injury.

As then a grant of privileges, to an individual creates legal rights, which cannot be infringed by legislative acts; and as there is no distinction, known in law, as to the effect of such a grant, when made to an individual, and when made to a private corporation, it follows, that the grant to the plaintiffs created legal rights, that were duly vested, and which of course cannot be infringed by the legislative acts in question. It is of no consequence, as it respects the right, whether the privileges, granted to the plaintiffs by their charter, are valuable, in a pecuniary point of view, or otherwise. They are essentially of the nature of private property, and consequently entitled to protection, like other private property.

The plaintiffs, in their aggregate capacity, are entitled to the franchise of being a corporation, and of enjoying all the privileges contained in their charter, according to its provisions. The President of the College is entitled to the quiet enjoyment of his office, with all the privileges and perquisites incident to it. And so also, the other members of the corporation are, individually, entitled to enjoy their respective privileges. In *Miller vs. Spateman*,¹ it is held, "That the law takes notice, that the natural members of the corporation, of whom the cor-

¹ 1 Saund. 344.

poration consists, are not strangers to the corporation, but are the parties interested in all the revenues and privileges of the corporation, of which they are members." A corporation may take a grant for the benefit of their particular members. In the celebrated case of *Ashby vs. White*, where an individual member of the corporation sued for an infringement of his right of suffrage, to which he was entitled, as a corporator, among the reasons assigned by the House of Lords for their judgment, it is said: "The inheritance of this privilege is in the corporation aggregate; but the benefit, possession, and exercise is in the persons of those who, by the constitutions of those charters, are appointed to elect. And in all cases, where a corporation hath such a privilege, the members thereof, in their private capacity, have the benefit and enjoyment thereof. It appears by other instances, that it is usual and proper for corporations to have interests granted them, which inure to the advantage of the members, in their private capacities."¹ Many cases are there stated of actions being maintained for the violation of such rights.²

Besides the right of the President to his office and emoluments, each individual trustee has the privilege of being a member, and of acting according to the provision of the charter, in all matters, relating to the government of the corporation, and in the management of its property, and in the conducting of all its concerns. These privileges, that the members of the corporation hold, in their private capacities, constitute vested rights, which are subject to no controul, but that of the law of the land.

It is not a new doctrine, that in a free government, the legislative power, without any direct and express restriction, is incompetent to abolish, or take away vested rights. It results from the very nature and design of a free government. This is plainly and forcibly asserted by Judge Chase, in delivering his opinion, in the case of *Calder vs. Bull*. "The purposes for which men enter into society, will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. *The nature and ends of legislative power will limit the exercise of it.* An act of the legislature, (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered as a rightful exercise of legislative authority. The obligation of a law, in governments, established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded." "A law that destroys or impairs the lawful private contracts of citizens; a law that makes a man judge in his own cause; or a law that takes property from A. and gives it to B. it is against all reason and justice for a people to entrust a legislature with such powers; and therefore it cannot be presumed that they have done it. The genius, the nature, and the spirit of our state governments amount

¹ 3 Hatsell's precedents, 221.

² *Walter vs. Hanger*. Moore. 882. — *Brooks Abr. Corporation*, 85.

to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature cannot change innocence into guilt, or punish innocence as a crime; *or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our federal, or state legislature possesses such powers, if they had not been expressly restrained would, in my opinion, be a political heresy, altogether inadmissible, in our free republican governments.*"¹

If then a correct view has been taken of the powers of the legislature and of the rights of the plaintiffs, it would not have been competent for the legislature to pass these acts, if there had been no special restrictions on the legislative power; because they are not within the general scope of that power, and consequently void.

. II. There are special restrictions, on the power of the legislature, in the constitution of this state, which these acts violate.

They violate that part of the 15th article of the bill of rights, which provides, "that no subject shall be arrested, imprisoned, despoiled, *or deprived of his property, immunities, or privileges*, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate; but by judgment of his peers, or the law of the land." If these acts are valid, the plaintiffs are deprived of their property, and of the "immunities and privileges," granted to them by their charter, by other means, than the judgment of their peers, or the law of the land. The acts of the legislature take away their rights and privileges, without any trial whatever.

This provision of the Bill of rights was unquestionably designed to restrain the legislature, as well as the other branches of government, from all arbitrary interference with private rights. It was adopted from magna charta, and was justly considered by our forefathers, long before the formation of our constitution, as constituting the most efficient security of their rights and liberties.

Lord Coke, in his commentary on magna charta, explains the phrase "by the law of the land" to mean "*by due course and process of law.*" That is, no subject shall be deprived of his property, immunities, or privileges, but by judgment of his peers, or by due course and process of law. This then surely cannot be done by special act of the legislature, without judgment of peers, and without any process of law. To make his meaning still more plain, if possible, that Parliament was bound by this provision of magna charta, Lord Coke says, "*against this ancient and fundamental law, and in the face thereof*, I find an act of Parliament made, &c.² directing certain summary and arbitrary proceedings, *by colour of which act, shaking this fundamental law*, it is not credible what horrible oppressions and exactions, to the undoing of infinite numbers of people, were committed by Sir Richard Empson and Edmund Dudley," "and the ill success thereof, and the fearful ends of these two oppressors, should deter others from commit-

¹ 3 Dall. 383.

² Stat. 11, Hen. 7.

ting the like; and should admonish Parliaments, that instead of this *ordinary and precious trial per legem terrae*, they bring not in absolute and partial trials, by discretion."¹

It is sufficiently apparent, that Lord Coke understood this provisor to extend to, and bind Parliament. Hence his complaint that Parliament had in that instance violated it, by dispensing with trials according to the law of the land; and authorizing, in certain cases, the exaction of forfeitures, on trials by the arbitrary discretion of magistrates. For even that act of Parliament, so justly denounced for its "horrible oppressions," did not, like the present acts of our legislature, attempt to devest, and take away private rights, without any trial at all. The construction of the provision has always been according to Lord Coke's opinion. It has never been doubted, that Parliament was morally bound by it. But the difficulty in England has been that Parliament, being omnipotent, in all matters of civil institution, is too powerful for the constitution, and cannot be restrained.

The same construction has been uniformly given to this provision, in the Courts of the different states of the Union. The Superior Court of South Carolina, in the case of *Bowman vs. Middleton*, decided that an act of the colonial legislature of 1712, taking property from one, and vesting it in another, without trial by jury, was void; because it infringed this provision of magna charta, which bound the legislature. They say, "that the plaintiffs can claim no title, under the act in question, as it was against common right, as well as against magna charta, to take away the freehold of one man, and vest it in another: and that too to the prejudice of third persons, without any compensation, or even a trial, by the jury of the country, to determine the right in question. That the act was therefore, ipso facto, void. That no length of time could give it validity, being originally founded on erroneous principles."² In a subsequent case, in the same Court, Waties, J., said he had gone into a long investigation of the technical import of the words *lex terrae*, "that they meant the common law, and ancient statutes, down to the time of Edward II. which were considered, as part of the common law. That this was the true construction, given to them, by all the commentators on magna charta, from whence they were adopted by the constitution of South Carolina. If the *lex terrae* meant any law, which the legislature might pass, the legislature would be authorized by the constitution, to destroy the right, which the constitution had expressly declared should forever be inviolably preserved. This is too absurd a construction to be the true one. He understood therefore the constitution to mean, that no freeman shall be deprived of his property, but by such means, as are authorized by the ancient common law of the land. According to this construction the right of property is held under the constitution, and *not at the will of the legislature*."³ Of the same import is the opinion of the Supreme Court of Massachusetts. "If this (an act of the legislature) is to be construed a disposal, by the legisla-

¹ 2 Inst. 51.

² 1 Bay. 252.

³ 2 Bay. 59.

ture, of lands owned by that proprietary, (under which the plaintiff claimed) or by any individual, claiming by their grant or allotment, it militates directly, with a well known provision of magna charta, revived and enforced in the bill of rights, prefixed to the constitution of government, for this Commonwealth; that no subject shall be deprived of his property, but by the judgment of his peers, or the law of the land; *not any private and special statute, for the purpose, but that law, which affects alike, under the same circumstances, the whole territory and community.*"¹

This provision of magna charta is introduced into the 5th article of the amendments of the constitution of the United States. The terms, in which it is there expressed, show conclusively that it was understood in the same sense, that we contend it always has been understood. They are, that "no person shall be deprived of life, liberty, or property, *without due process of law.*" This is manifestly designed to secure a trial, according to the established laws of the land; and it certainly restrains the legislature, from depriving an individual of his life, liberty, and property, without such trial. The two phrases "law of the land" and "due process of law," as used in the two constitutions, doubtless have the same meaning. If otherwise, however, the result will be the same. For the legislature of this state is as much bound by this provision in the constitution of the United States, as they would be, were it contained in our own constitution. If the plaintiffs are deprived of their property by the acts in question, it certainly has not been done by due process of law. The law provides no such summary process, by which individuals may, without trial, be deprived of their rights.

Thus has this provision been always understood, as imposing a restraint on the legislative power, from the time it was first introduced into magna charta, down to the present time. It has been incorporated into the constitution of most of the states of the Union, and it is believed, that not a single judge, or commentator, either before, or since it was introduced into our constitution, has attempted to give it a different meaning. The terms used are general, embracing the legislature, equally with the other departments of government; and any reason, which can be assigned, for excepting the legislature from this restraint, may, with equal force, be applied, for excepting either, or both the other departments. Indeed if this provision were not applicable to the legislature, it would be idle and useless. The previous part of this article of the bill of rights, together with others, regulating the manner of trials, are more especially designed, to restrain the judiciary. This seems to be the only provision, to be found in the constitution of this state, against the legislature's passing special acts, for the regulation of individual cases. It restrains the legislature from passing acts, which spend their force on one, or more individuals, and are not to apply to others, under similar circumstances. The law of the land is applicable to the community at large.

¹ Little vs. Frost, 3 Mass. R. 117.

The greatest, if not only effectual, security against legislative oppression, is, that the law must be general, embracing all under like circumstances, and including the legislators among the rest. An oppressive law, applicable to the whole community, will soon be repealed. But if the legislature, under the influence of prejudice, or passion, to which all bodies of men, however constituted or selected, are occasionally subject, can pass acts, having the force of laws, to apply to a solitary individual only, he may be destroyed, before public sympathy can be excited for his relief. A law, according to any just definition, that ever has, or can be given of it, must be general in its operation. It is a rule of conduct, for all, within the principle it establishes. An act of the legislature, prescribing a particular rule, for the government of one or more individuals, therein named, would not have the force of law, but would be void.¹ This principle is not inconsistent with the power of the legislature to pass private statutes. Such statutes, instead of taking away, confer privileges; and whatever regulations are imposed, in consideration of the privileges granted, become binding, by the assent of the parties, at whose application the statutes are passed.

If this construction, which has always hitherto been put on the article of the bill of rights, under consideration, is to be still abided by, it is conclusive in favour of the plaintiffs. Their charter grants them certain "immunities and privileges." This article provides, in effect, that they shall not be deprived of these "immunities and privileges," but by due trial, and according to the well known general laws of the land, which are binding on the whole community. The acts of the legislature, which are made for the purpose of depriving them of their immunities and privileges, without any trial whatever, must therefore be declared to be void.

These acts violate also the 23d article of the bill of rights, which provides that, "retrospective laws are highly injurious, oppressive and unjust. No such laws therefore should be made, either for the decision of civil causes, or the punishment of offences."

There can be no ground for dispute, as to what constitutes a retrospective law. In the case *Calder vs. Bull*, Judge Chase says, "every law, that takes away, or impairs rights, vested agreeably to existing laws, is retrospective."² The correctness of this definition of retrospective laws has never been disputed, as is known. It was adopted, and made the ground of decision, in the case of the *Society vs. Wheeler*, in the Circuit Court of the United States in this District. In the very able opinion there delivered, it is said, "upon principle, every statute, which takes away, or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities."³ It is not only against natural justice, but utterly

¹ Holden vs. James, 11 Mass. Rep. 396.

² 3 Dall. 391.

³ 2 Gall. 105.

inconsistent with every correct idea of a law, that it should be made to operate retrospectively on past actions, and vested rights.¹

This article prohibits the passing of retrospective laws of any kind, as well such as affect the rights of property, and individual privileges, as those, made for the punishing crimes. The latter, which are generally called *ex post facto* laws, and which are no more unjust than the former, have been denounced, by a most respectable authority, as being a more unreasonable, and cruel method of ensnaring people to their ruin, than that adopted, by the worst of the Roman emperors, who wrote his laws in a small character and hung them up on high pillars, to prevent their being read.²

It is hoped, that it has been already sufficiently shown, that the plaintiffs have vested rights, acquired under existing laws. If so, these acts, which infringe their rights, are retrospective, and void. The plaintiff's rights were perfect and complete. They were in the full enjoyment of their property and privileges, and by no existing law could they have been ousted or molested. If this article does not protect such rights, it is not easy to perceive what rights are protected by it.

The 37th article provides, that the three essential powers of government "ought to be kept, as separate from, and independent of each other, as the nature of a free government will admit, or as is consistent with that chain of connection, which binds the whole fabrick of the constitution in one indissoluble bond of union and amity." This article has already been noticed, as bearing on the general powers of the legislature. It may also, with propriety, be considered as imposing a special restraint against the legislature's exercising judicial power. The limitation, with which this great elementary principle is adopted, does not, in any degree, lessen its force, in relation to the question under consideration. The bill of rights establishes general principles, by which the constitution of government was formed, and according to which, it is to be construed. The three departments of government are connected together, and in certain particulars, dependent on each other. The constitution declares the extent of this connection and dependence. Powers are, in certain cases and for special purposes, given to one department, which partake of the nature of the general powers of another department. This qualification was necessary to preserve consistency in the different parts of the constitution. For the conducting of impeachments, for instance, the legislature is vested with judicial power. It would therefore have been absurd, after this express grant of judicial power, in that case, to have declared, without qualification, that the legislature should exercise no judicial power.

By the proper construction of this article, each department is restrained, from exercising any of the general powers of another department, except in cases, where it is especially authorized by the constitution. A construction that should leave each department at

¹ Dash vs. Van Kleeck, 7 John. R. 477.

² 1 Black. 46.

liberty, to exercise the powers of another, whenever it might deem it expedient, would render the provision of the article useless. Indeed the language admits of no other construction than that before stated. The substance is, that the three powers of government shall be kept, as separate and independent, as is consistent, with the nature of a free government, and the provisions of the constitution. The free government, here meant, is doubtless one, where the rulers have no powers, other than what are delegated to them, by the people. Is it inconsistent with the nature of such a government, or with the provisions of our constitution, that the legislature should abstain from the exercise of judicial power, in cases where that power is not granted to them, but is granted to another department? We have already seen, that no free government can exist, without such a restraint on the legislative power.

Under the first point, it was shown, that the general legislative power did not extend, to the divesting of private rights, and that the passing of these acts which take from the plaintiffs their rights, and give them to others, was substantially an exercise of judicial power. That the legislature did not examine witnesses, and hear the parties, before they decided on their rights, shows only the extent of the oppression, and the total incompetency of the legislature to exercise judicial power, in such cases. As then no special authority is given to the legislature, to exercise judicial power, in this or similar cases, the acts violate also this article of the constitution.

III. It is contended that the acts violate the 10th section of the 1st article of the constitution of the United States, which provides that "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

[The argument on this point is omitted.]

At November Term, 1817, in Grafton County, the opinion of the Court was delivered by

RICHARDSON, C. J.¹ This cause, which is trover for sundry articles alleged to be the property of the plaintiffs, comes before the court upon a statement of facts, in which it is agreed by the parties that the trustees of Dartmouth College were a body corporate duly organized under a charter bearing date December 13, 1769; that the several articles, mentioned in the writ, were the property of that body corporate, and that before the commencement of this action the said articles being in the possession of the defendant, he refused, although duly requested, to deliver them to the plaintiffs. Upon these facts it is clear, that judgment must be rendered for the plaintiffs, unless the facts, upon which the defendant relies, constitute a legal defence.

By an act of this state passed June 27, 1816, entitled "An act to

¹ From the docket entries, recited in 65 N. H. p. 624, note 1, it would seem that Mr. Justice Woodbury did not sit in this case; and that the only justices who sat were Richardson, C. J., and Bell, J. — ED.

amend the charter and enlarge and improve the corporation of Dartmouth College," it is among other things enacted "that the corporation heretofore called and known by the name of the Trustees of Dartmouth College shall ever hereafter be called and known by the name of the Trustees of Dartmouth University, and the whole number of said trustees shall be twenty-one, a majority of whom shall form a quorum for the transaction of business, and they and their successors in that capacity as hereby constituted, shall respectively forever have, hold, use, exercise and enjoy all the powers, authorities, rights, property, liberties, privileges and immunities which have hitherto been possessed, enjoyed and used by the trustees of Dartmouth College." — "And the governor and council shall by appointment as soon as may be, complete the present board of trustees to the number of twenty-one as provided for by this act, and shall have power also to fill all vacancies that may occur previous to, or during the first meeting of said board of trustees." By an act of this State passed Dec. 18, 1816, entitled "An act in addition to and in amendment of an act entitled an act to amend the charter, &c." it is declared "that the governor with advice of council is authorized to fill all vacancies that have happened, or may happen in the board of said trustees previous to their next annual meeting."

It is agreed by the parties, that in pursuance of the provisions of these acts, the governor and council "completed the said board of trustees to the number of twenty-one," by appointing nine new trustees, who accepted the trust; and that previous to the commencement of this action, at a meeting of the trustees of Dartmouth University held as the law requires, and composed of two of the former trustees of Dartmouth College and the nine new trustees appointed as aforesaid, being a sufficient number to constitute a quorum of the whole board of twenty-one, the defendant was duly appointed treasurer and secretary of the trustees of Dartmouth University; and the articles mentioned in the plaintiffs' writ duly committed to his custody as the property of the University.

It is also agreed, that nine of the old trustees of Dartmouth College have individually and as far as by law they could, as a corporation, refused to accept the provisions of the acts of June 27, and Dec. 18, 1816, and still claim to be a corporation as constituted by the charter of 1769, and to have the same controul over the property which belonged to the College, as they had before these acts were passed. And this action is brought to enforce that claim. If those parts of the acts above mentioned, which authorize the appointment of new trustees, are valid and binding upon the trustees of Dartmouth College, without their consent, this action cannot be maintained: because in that case the corporation must now be considered as composed of twenty-one members, and any claim of a minority of the corporation to controul the affairs of the Institution in opposition to the majority is clearly without any legal foundation. But if on the other hand those acts are

to be considered in that respect as unconstitutional and void, then the appointment and all the doings of the new trustees are invalid; the corporation remains as constituted by the charter of 1769; and the plaintiffs must prevail in this action. The decision of the cause must therefore depend upon the question, whether the legislature had a constitutional right to authorize the appointment of new trustees, without the consent of the corporation?

This cause has been argued on both sides with uncommon learning and ability, and we have witnessed with pleasure and with pride a display of talents and eloquence upon this occasion in the highest degree honourable to the profession of the law in this state. If the counsel of the plaintiffs have failed to convince us that the action can be maintained, it has not been owing to any want of diligence in research, or ingenuity in reasoning, but to a want of solid and substantial grounds on which to rest their arguments.

A complaint that private rights protected by the constitution have been invaded, will at all times deserve and receive the most deliberate consideration of this court. The cause of an individual whose rights have been infringed by the legislature in violation of the constitution, becomes at once the cause of all. For if a private right be thus infringed to-day, and that infringement be sanctioned by a judicial decision to-morrow, there will be next day a precedent for the violation of the rights of every man in the community; and so long as that precedent is followed, the constitution will be in fact to a certain extent repealed. An unconstitutional act must always be presumed to have been passed inadvertently or through misapprehension; and it is equally to be presumed that every honest legislator will rejoice when such an act is declared void, and the supremacy of the constitution maintained. But we must not for a moment forget, that the question submitted to our decision in such cases, is always one of mere constitutional right;—sitting here as judges, we have nothing to do with the policy or expediency of the acts of the legislature. The legislative power of this state extends to every proper object of legislation, and is limited only by our constitutions and by the fundamental principles of all government and the unalienable rights of mankind. In giving a construction however to a doubtful clause in the constitution, we might with propriety weigh the conveniences and inconveniences which would result from a particular construction, because in such a case arguments drawn from those sources might have a tendency to shew the probable intention of the makers of the constitution. But when the constitutional right to pass a law is clear, the question of expediency belongs exclusively to the legislature. Nor is an act in any case to be presumed to be contrary to the constitution. The opposition between that instrument and the act should be such as to produce upon our minds a clear and strong conviction of their incompatibility with each other, before we pronounce the act void. A decent respect for the other branches of the government, ought to induce us to weigh well the reasons, upon which

we found our opinions upon questions of this kind, and not to refuse to execute a law, till we are able to vindicate our judgment by sound and unanswerable arguments. For if we refuse to execute an act warranted by the constitution, our decision in effect alters that instrument, and imposes new restraints upon the legislative power, which the people never intended. On the other hand, if clearly convinced that an act of the legislature is unconstitutional, we should be unworthy of the station in which we are placed, if we shrunk from the duties which that station imposes.

In order to determine the question submitted to us, it seems necessary in the first place to ascertain the nature of corporations. — A corporation aggregate is a collection of many individuals united into one body under a special name, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, and having collectively certain faculties, which the individuals have not. A corporation considered as a faculty, is an artificial, invisible body, existing only in contemplation of law: and can neither employ its franchises nor hold its property, for its own benefit. In another view, a corporation may be considered as a body of individuals having collectively particular faculties and capacities which they can employ for their own benefit, or for the benefit of others, according to the purposes for which their particular faculties and capacities were bestowed. In either view it is apparent, that all beneficial interests both in the franchises and the property of corporations, must be considered as vested in natural persons, either in the people at large, or in individuals; and that with respect to this interest, corporations may be divided into *publick* and *private*.

Private corporations are those which are created for the immediate benefit and advantage of individuals, and their franchises may be considered as privileges conferred on a number of individuals, to be exercised and enjoyed by them in the form of a corporation. These privileges may be given to the corporators for their own benefit, or for the benefit of other individuals. In either case the corporation must be viewed in relation to the franchises as a trustee, and each of those, who are beneficially interested in them, as a *cestui que trust*. The property of this kind of corporations and the profits arising from the employment of their property and the exercise of their franchises, in fact belongs to individuals. To this class belong all the companies incorporated in this state, for the purpose of making canals, turnpike roads and bridges; also banking, insurance and manufacturing companies, and many others. Both the franchises and the property of these corporations exist collectively in all the individuals of whom they are composed; not however as natural persons, but as a body politick, while the beneficial interest in both is vested severally in the several members, according to their respective shares. This interest of each individual is a part of his property. It may be sold and trans-

ferred, may, in many cases, be seized and sold upon a *fieri facias*, and is assets in the hands of his administrator. This is by no means a new view of this subject. The supreme court of Massachusetts in the case of *Gray vs. The Portland Bank*,¹ most evidently viewed corporations of this kind in the same light. In the case of the *Bank of the United States vs. Devaux*,² the supreme court of the United States decided, that in determining a question of jurisdiction depending upon the citizenship of the parties, and a corporation being a party, they could look to the citizenship of the individual corporators as of the real litigants. The rejection of a corporator as a witness, in cases where the corporation is a party, on the ground of private interest is a matter of familiar practice in all our courts.

Public corporations are those, which are created for publick purposes, and whose property is devoted to the objects for which they are created. The corporators have no private beneficial interest, either in their franchises or their property. The only private right which individuals can have in them, is the right of being, and of acting as members. Every other right and interest attached to them can only be enjoyed by individuals like the common privileges of free citizens, and the common interest, which all have in the property belonging to the state. Counties, towns, parishes, &c. considered as corporations, clearly fall within this description. A corporation, all of whose franchises are exercised for publick purposes, is a publick corporation. Thus if the legislature should incorporate a number of individuals, for the purpose of making a canal, and should reserve all the profits arising from it to the state, though all the funds might be given to the corporation by individuals, it would in fact be a publick corporation. So if the state should purchase all the shares in one of our banking companies, it would immediately become a publick corporation. Because in both cases all the property and franchises of the corporations would in fact be publick property. A gift to a corporation created for publick purposes is in reality a gift to the publick. On the other hand, if the legislature should incorporate a banking company for the benefit of the corporators, and should give the corporation all the necessary funds, it would be a private corporation. Because a gift to such a corporation would be only a gift to the corporators. So, should the state purchase a part of the shares in one of our banks, it would still remain a private corporation so far as individuals retained a private interest in it. Thus it seems, that whether a corporation is to be considered as publick or private, depends upon the objects for which its franchises are to be exercised; and that as a corporation possesses franchises and property only to enable it to answer the purposes of its creation — a gift to a corporation is in truth a gift to those who are interested in those purposes.

Whether an incorporated college, founded and endowed by an individual, who had reserved to himself a controul over its affairs as a

¹ 3 Mass. Rep. 379.

² 5 Cranch, 61.

private visitor, must be viewed as a publick or as a private corporation, it is not necessary now to decide, because it does not appear that Dartmouth College was subject to any private visitation whatever.

Upon looking into the charter of Dartmouth College we find that the king "being willing to encourage the laudable and charitable design of spreading christian knowledge among the savages of our American wilderness, and also that the best means of education be established in the province of New-Hampshire, for the benefit of said province" ordained that there should be a college created in said province by the name of Dartmouth College, "for the education and instruction of youth of the Indian tribes, in this land, in reading, writing and all parts of learning, which should appear necessary and expedient for civilizing and christianizing children of Pagans, as well as in all liberal arts and sciences, and also of English youth and any others;" and that there should be in the said Dartmouth College from thenceforth and forever, a body politick, consisting of trustees of Dartmouth College. He then "made, ordained, constituted and appointed" twelve individuals to be trustees of the College, and declared that they and their successors, should forever thereafter be a body corporate, by the name of the trustees of Dartmouth College; and that said corporation should be "able, and in law capable *for the use of said college*, to have, get, acquire, purchase, receive, hold, possess and enjoy tenements, hereditaments, jurisdictions and franchises, for themselves and their successors, in fee simple or otherwise;" — and "to receive and dispose of any lands, goods, chattels and other things of what nature soever, *for the use aforesaid*; and also to have, accept and receive any rents, profits, annuities, gifts, legacies, donations or bequests of any kind whatsoever, *for the use aforesaid*." Such are the objects, and such the nature of this corporation, appearing upon the face of the charter. It was created for the purpose of holding and managing property for the use of the college; and the college was founded for the purpose of "spreading the knowledge of the great Redeemer" among the savages and of furnishing "the best means of education" to the province of New-Hampshire. These great purposes are surely, if any thing can be, matters of publick concern. Who has any private interest either in the objects or the property of this institution? The trustees themselves have no greater interest in the spreading of christian knowledge among the Indians, and in providing the best means of education, than any other individuals in the community. Nor have they any private interest in the property of this institution, — nothing that can be sold or transferred, that can descend to their heirs, or can be assets in the hands of their administrators. If all the property of the institution were destroyed, the loss would be exclusively publick, and no private loss to them. So entirely free are they from any private interest in this respect, that they are competent witnesses in causes where the corporation is a party, and the property of the corporation in contest. There is in Peake's cases at Nisi Prius, 154, an authority direct to this

point. It is the case of Weller against the governors of the Foundling Hospital, and was assumpsit for work and labour. Most of the witnesses called on behalf of the defendants, were governors and members of the corporation. Lord Kenyon was of opinion that they were nevertheless good witnesses, because they were mere trustees of a publick charity, and had not the least personal interest. The office of trustee of Dartmouth College is, in fact, a publick trust, as much so as the office of governor, or of judge of this court; and for any breach of trust, the State has an unquestionable right, through its courts of justice to call them to an account. The trustees have the same interest in the corporate property, which the governor has in the property of the state, and which we have in the fines we impose upon the criminals convicted before this court. Nor is it any private concern of theirs, whether their powers, as corporators, shall be extended or lessened, any more than it is our private concern whether the jurisdiction of this court shall be enlarged or diminished. They have no private right in the institution, except the right of office, — the right of being trustees, and of acting as such. It therefore seems to us, that if such a corporation is not to be considered as a publick corporation, it would be difficult to find one that could be so considered.

It becomes, then, unnecessary to decide in this case, how far the legislature possesses a constitutional right to interfere in the concerns of *private corporations*. It may not however be improper to remark, that it would be difficult to find a satisfactory reason why the property and immunities of such corporations should not stand, in this respect, on the same ground with the property and immunities of individuals.

In deciding a case like this, where the complaint is that corporate rights have been unconstitutionally infringed, it is the duty of the court to strip off the forms and fictions with which the policy of the law has clothed those rights, and look beyond that intangible creature of the law, the corporation which in *form* possesses them, to the individuals and to the publick, to whom in *reality* they belong, and who alone can be injured by a violation of them. This action, therefore, though in *form* the complaint of the corporation, must be considered as in *substance* the complaint of the trustees themselves.

The acts in question can only effect *publick* or *private* rights and interests. With regard to the rights and interests which the *publick* may have in this Institution, — no provision in the constitution of this state, nor of the United States, is recollected, which can protect them from legislative interference. We have been referred to no such provision in the argument. The clauses in those constitutions, upon which the plaintiffs' counsel have relied, were most manifestly intended to protect private rights only. All publick interests are proper objects of legislation; and it is peculiarly the province of the legislature, to determine by what laws those interests shall be regulated. Nor is the expediency, or the policy of such laws, a subject for judicial decision. The constitution has given to the general court full power and authority

to make and ordain all such laws “as *they* may judge for the benefit and welfare of this state.” Should we assume the power of declaring statutes valid or invalid, according to our opinion of their expediency, it would not be endured for a moment, but would be justly viewed by all, as a wanton usurpation, altogether repugnant to the principles of our government. Nor are these plaintiffs competent to call in question the validity of these laws in a court of justice, on the ground that they are injurious to the publick interests. A law is only the publick will duly expressed. These trustees are the servants of the publick, and the servant is not to resist the will of his master, in a matter that concerns that master alone. If these acts be injurious to the publick interests, the remedy is to be sought in their repeal, not in courts of law. But if these acts infringe *private* rights, protected by the constitution, whether of the trustees themselves, or of others, whose rights they, from their situation, are competent to vindicate, then the plaintiffs have proper grounds, upon which to submit their validity to our decision.

All private rights in this institution must belong, either to those who founded, or whose bounty has endowed it; to the officers and students of the college; or to the trustees.

As to those who founded or who have endowed it; no person of this description, who claims any private right, has been pointed out or is known to us. It is not understood that any person claims to be visitor of this college. An absolute donation of land or money to an institution of this kind, creates no private right in it. Besides, if the private rights of founders or donors have been infringed by these acts, it is their business to vindicate their own rights. It is no concern of these plaintiffs. When founders and donors complain, it will be our duty to hear and decide; but we cannot adjudicate upon their rights, till they come judicially before us. It has been strenuously urged to us, in the argument, that these acts will tend to discourage donations, and are therefore impolitick. Be it so. That was a consideration very proper to be weighed by those who made the acts, but is entitled to no weight in this decision.

The officers and students of the college have, without doubt, private rights in the institution — rights which courts of justice are bound to notice — rights, which, if unjustly infringed, even by the trustees themselves, this court upon a proper application, would feel itself bound to protect. But for any injury done to their rights, they have their own remedy. It would be unjust to prejudice their case on this occasion. They are not parties to this record, and cannot be legally heard in the discussion of this cause. If no form of action given them by law can be conceived; it is because these acts do no injury to their rights.

The real question then is, do these acts unconstitutionally infringe any private rights of these trustees? It is said that these acts in fact, attempt to dissolve the old corporation, to create a new one, and to transfer the property of the old corporation to the new; and are there-

fore void on the principle decided in *Territ & al. vs. Taylor*.¹ But admitting this to be the attempt, we might with great propriety remark, in the language of Ashurst justice, in the case of the King against Pasmore,² that “the members of the old body, have no injury or injustice to complain of, for they are all included in the new charter of incorporation, and if any of them do not become members of the new incorporation, but refuse to accept, it is their own fault.” But it seems to us impossible to suppose, that the legislature intended by these acts, to dissolve the old corporation or to create a new one: nor do we conceive that the addition of new members, can in any case be considered as a dissolution of a corporation. The legislature of this state have not unfrequently annexed tracts of inhabited territory to towns, and thereby added new members to the corporation. Yet who ever supposed that this was a dissolution of the old, and the creation of a new corporation? Our statute of Dec. 11, 1812,³ makes the shares and interest of any person, in any incorporated company, liable to be seized and sold upon execution, and gives to the purchaser all the privileges appertaining thereto; and of course makes him a member of the corporation. But the thought probably never occurred to any man, that when a new member is added, by virtue of that act, the corporation is thereby dissolved, and a new one created. Yet that act has at least, as much dissolving, and as much creating force, as the acts now under consideration.

The plaintiffs, in taking this ground, seem not to have adverted to a material distinction, which, certainly exists between the rights and faculties relating to corporations, which can exist only in the corporators, as natural persons, and the corporate rights and faculties, which can exist only in the corporation. The right to the beneficial interest in the corporate property, can only exist in natural persons. But the legal title and ownership in corporate property, can in no case be considered as vested in the several corporators, as natural persons, either jointly or severally, but collectively in all, as one body politic, made capable by the policy of the law, of holding property as an individual. This artificial individual, which is said to be immortal, holds in all cases the legal title. Hence a corporation may maintain trespass against any of its members, who intermeddle with its property without its consent. Hence too, the legal title of a corporation in lands, will not pass by the deed of all its members. This faculty of holding property as an individual, which the policy of the law vests in a body of natural persons, that can be perpetuated by known rules of law, is one of the great ends and uses of an incorporation. But the natural persons who compose this artificial, immortal individual, in which the property is vested, must, in the nature of things, be continually fluctuating and changing; and yet the artificial individual remains in contemplation of law the same. It is therefore clear, that the legal identity of a corporation does not depend upon its being composed of

¹ 9 Cranch, 43.² 3 Durnford and East, 244.³ N. H. Laws, 184.

the same natural persons, and that an addition of new members to a corporation, cannot, in itself, make it a new and different corporation. The immortality of a corporation depends upon a continued accession of new members. The mode in which this accession is effected, is immaterial. A few of our corporations are perpetuated by a power of electing new members, placed in the corporations themselves. But most of our publick, and all our private corporations, are perpetuated by mere operation of law, without any corporate act whatever. Nor, by the addition of new members, is any part of the legal title to the corporate property, transferred from the old to the new members. That title remains unaltered in the corporation. The old members had not personally any such title that could be taken from them; and the new members have personally acquired none. The error of the plaintiffs on this subject, probably originated in their supposing that the legal title to corporate property is vested in the corporators, in the same manner that the title to partnership property is vested in co-partners. Indeed their counsel endeavored to illustrate this point, by comparing corporate to partnership property. And if the comparison had been just, the inferences which the counsel made, would also have been just. But the comparison does not hold, unless we are entirely mistaken as to the manner in which the legal title to corporate property is vested. The addition of new members by a legislative act, even to a private corporation, does not necessarily divest the old corporators, of any private beneficial interest, which they may individually have in the corporate property. Suppose the legislature should enact, that the governor should be *ex-officio* a member of all the banking corporations in the state. This might give him a personal influence in the management of their concerns, but would give him no beneficial interest whatever, in the corporate property. The interest of the stock-holders would remain the same. In the case of corporations, where all the benefit derived from them consists in the privileges incident to membership, as in incorporated library companies, it may be otherwise. But in the property of publick corporations, there is no private beneficial interests that can be divested. We are therefore of opinion, that these acts, if valid, do not dissolve the old corporation, nor create a new one; nor do they operate in such manner as to change or transfer any legal title, or beneficial interest, in the corporate property, but the legal title remains in the corporation, and the beneficial interest in the publick, unaffected.

It has also been contended, that it depends altogether upon contract, whether the old trustees shall become members of the corporation as now organized; that there can be no contract without consent, and that therefore, these acts cannot bind the old trustees without their consent, and must in the nature of things, be invalid. The whole amount of this argument is this: a statute, which attempts to compel the members of a corporation to become members of that corporation, differently organized, without their consent is invalid; and as

these acts make such an attempt, they are therefore invalid. To this there are two decisive answers. 1. Neither of the propositions upon which the conclusion rests is true. 2. Admitting the premises to be correct, the legitimate conclusion to be drawn from them, is wholly irrelevant to the question in this case. In the first place, the proposition that it depends altogether upon contract, whether individuals shall become members of particular corporations, is not universally true; and so far as respects publick corporations, is never true. The legislature has a most unquestionable right, to compel individuals to become members of publick corporations. Thus when a town is incorporated, all the inhabitants become members of the corporation, and continue members so long as they reside within its limits, whether they consent or not. Nor is there any good reason to doubt that the legislature possess the right to compel individuals to accept the office of trustees of Dartmouth College, however the corporation may be organized, any more than there is to doubt the right of the legislature to compel individuals to serve as town officers, as is done by our statute of Feb. 8, 1791,¹ or to be enrolled in the militia and hazard their lives in defence of the state. It is a fundamental principle of all governments recognized in the twelfth article of our bill of rights, that a state has a right to the personal service of its citizens, whenever the publick necessity requires it,—and the government has a right to judge of that necessity. There is a very strong case in 2 Modern Rep. 299. *The Attorney general vs. Sir John Read.* It was an information against Read, for refusing to serve as high sheriff of Hertfordshire. His defence was, that being under sentence of excommunication, he could not receive the sacrament: and that by serving as high sheriff without receiving it, he subjected himself to a penalty of £500, but the court held that he was punishable for not removing the disability, it being in his power to get himself absolved from the excommunication: and gave judgment against him. — Nor is the proposition, that these acts attempt to compel the old trustees to become members of this corporation as now organized, without their consent, true. They are left perfectly at liberty to continue members of this corporation or not, according to their own pleasure. It is enacted, that the board shall hereafter consist of twenty-one members; but it is not enacted that they shall continue members of it against their consent. They had, before these acts were passed, a perfect right to resign when they pleased; and that right is not impaired by these acts.

But in the second place, admitting the premises to be true, the legitimate conclusion does not bear upon the question in this case. The fair conclusion to be drawn from the premises, is, that these acts, so far as they attempt to compel the old members to become members of the corporation, as now organized, are invalid. But the question here is not, whether the legislature can compel the old trustees to become

¹ Laws, 241.

members of the newly organized corporation, but whether it has a constitutional right to make a new organization of the corporation, by adding new members? And it is very apparent, that although the legislature may not possess the power to do the one, yet still it may have a constitutional right to do the other. There is a clear distinction between laws binding corporate bodies, and laws attempting to bind individuals to continue members of corporate bodies. Thus the legislature has an undoubted right, at all times, to pass laws binding the whole body politic of the state; but it is by no means clear, that the legislature has at all times a right to compel individuals to remain in the state, and be subject to those laws. So the legislature has a right to incorporate towns; but can it compel the inhabitants to remain in them, and continue members of such corporations?

But what is such a new organization of a corporation as cannot be made, without the consent of the corporators? If new members cannot be added, can any new duty be imposed upon a corporation; or can the corporate powers and faculties be in any way limited, without such consent? Our statute of June 21, 1814, (laws 284) makes it the duty of the several incorporated banks, to make a return of the state of their several banks, to the governor and council, annually, in June, under a penalty of \$1000. If the doctrine of these plaintiffs be true, may not the stockholders say that they cannot be compelled to be members of corporations, subject to new and different duties, without their consent, and that therefore this act is void? And may not the same argument be used in regard to the acts of June 11, 1803, and June 17, 1807, which prohibit banks from issuing bills of a certain description? In fact, does not this doctrine amount to a denial of the right to legislate at all, on the subject of corporations, without their consent?

But, although an artificial individual, capable of holding the legal title to property, may be created by the policy of the law, and a kind of artificial will and judgment as to the management of its concerns, given to it by making the consent of a number of natural persons necessary in all its acts; yet still this artificial will and judgment is, after all, only the private will and judgment of natural persons, in some respects limited and restricted. In this point of view, a corporation may be considered as a body of natural persons, having power and authority vested in them, to manage the corporate concerns in such manner as a majority of a competent number of them may judge and determine to be best calculated to answer the ends of the incorporation. And it has been truly said, by the counsel of the plaintiffs, that by the charter of 1769 exclusive power and authority was given to the twelve trustees to manage the affairs of this corporation in such manner as a majority of any seven or more of them, duly convened for the purpose, might judge most expedient to answer the purposes of the institution; and that the right of the twelve, to exercise that exclusive power and authority is taken away by these acts, and others admitted to share

that power and authority with them. Such is, without doubt, the operation of these acts; and it seems to us that this is the whole ground of complaint, which the plaintiffs can have. These acts compel the old trustees to sacrifice no private interest whatever, but merely to admit others to aid them, in the management of the concerns of a public institution: and if they have no private views to answer, nor private wishes to gratify, in the management of those concerns, (and it would be very uncharitable to suppose they can have, for it is extremely dishonourable to prostitute public interest to private purposes) it is not very easy to see how this can furnish any very solid ground of complaint. Had the affairs and concerns of Dartmouth College been their own private affairs and concerns, such an interference would have had a very different complexion.

But the plaintiffs contend that these acts impair their right to manage the affairs of this institution, in violation of that clause in the fifteenth article in our bill of rights, which declares that "no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land." That the right to manage the affairs of this college, is a privilege within the meaning of this clause of the bill of rights, is not to be doubted. But how a privilege can be protected from the operation of a law of the land, by a clause in the constitution declaring that it shall not be taken away, but by the law of the land, is not very easily understood. This clause in our bill of rights, seems to have been taken from the 29th chapter of Magna Charta. "No freeman shall be taken or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be out-lawed or exiled, or any otherwise destroyed, nor will we pass upon him nor condemn him, but by lawful judgment of his peers, or by the law of the land." The origin and history of Magna Charta is familiar to lawyers and politicians. Sullivan in his Lectures, 383-4, says that this chapter is the corner stone of English liberties, made in affirmance of the old common law; and that by the bare reading of it, we may learn the extravagancies of king John's reign, which it was intended to redress. It is evident, from all the commentaries upon it by English writers, that it was intended to limit the powers of the crown, and not of parliament.¹ Thus the franchises of a corporation are protected by this clause, in the great charter, and cannot be taken away by the king, unless by due process of law in his courts of justice for a forfeiture incurred. But parliament can dissolve a corporation by statute.² The object of the clause in our bill of rights, now under consideration, seems always to have been understood in this state, to be the protection of private rights, from all interference of single branches of the government, and of individual magistrates, not

¹ Sullivan's Lectures, 383-408. ² Institute, 45. ⁴ Blackstone's Commentaries 423.

² 1 Blackstone's Commentaries, 485.

warranted by law. Thus if the house of representatives or the senate, or the governour and council, or even a court should order an individual to be arrested, or his property to be seized in a case not warranted by the law of the land, it would be a violation of this clause in the bill of rights.—So if an individual were arrested upon the warrant of a justice of the peace, the cause of which had not been previously supported by oath or affirmation, this clause in the bill of rights would be violated. At this term, in this county, we have decided, in the case of *Hutchins vs. Edson*, that an arrest upon an execution issuing from this court, but not under seal, which is required both by the constitution and by statute, was a violation of this clause in the bill of rights and altogether illegal and void. But all statutes, not repugnant to any other clauses in the constitution, seem always to have been considered as “the law of the land,” within the meaning of this clause. Thus, our statute of December 24, 1799, authorizes selectmen and tythingmen, within their respective precincts, to stop persons suspected of travelling unnecessarily on the Sabbath; and if no sufficient excuse be given, to detain them in custody, until a trial can be had; and in the case of *Mayo vs. Wilson and others*, Cheshire, May 1817, we decided, after very mature consideration, that an individual who had been duly arrested and detained in pursuance of that statute, must be considered as having been deprived of his liberty “by the law of the land.”

We have publick statutes, authorizing the selectmen of towns to take the lands of individuals for highways, and empowering firewards “to pull down, blow up or remove any house or buildings,” when necessary to stop the progress of fire. We have private acts, giving to turnpike corporations authority to take the land of individuals for their roads. Under all these statutes, the property of individuals is often taken without their consent; and yet it seems never to have been doubted that those statutes were “the law of the land,” within the meaning of the constitution. By the statute of December 24, 1805, entitled “an act respecting idle persons,” judges of probate are authorized, in certain cases, to appoint guardians of idle persons, and thereby take from them all controul over both their real and personal estate. This act has been in our statute book nearly twelve years, as a part of “the law of the land,” and no one has ever called its validity in question. By an act of December 11, 1804,¹ a part of the town of Wendell, in the county of Cheshire, is annexed to the town of New-London, in the county of Hillsborough, and by that act the exclusive power and authority of the former inhabitants of New-London, to manage their corporate concerns, is taken away in the same manner that the exclusive authority of these plaintiffs, to manage the affairs of Dartmouth College, is taken away. The same thing has frequently been done to other towns. Yet it has never been made a question in our courts, whether those acts were “the law of the land,” within the

¹ Laws, 51.

meaning of this clause in the bill of rights. Indeed, if this clause is to be construed to protect private property and rights from all legislative interference, what construction is to be given to that clause in the twelfth article in the bill of rights, which declares that "no part of a man's property shall be taken from him, or applied to publick uses, without his own consent or that of the representative body of the people?" The cases in which a man's property may be taken from him, or applied to publick uses, with the consent of the representative body, are not specified; but it undoubtedly includes all those not expressly protected by other clauses of the constitution. No one of the acts just mentioned, seems to afford to the individuals, whose property and privileges may be affected by them, a less solid ground of complaint than the acts in question do to the plaintiffs. If the latter be repugnant to this clause in the constitution, so must be the former. There seems to be no substantial difference in the cases, on which a solid distinction can be founded. If we decide that these acts are not "the law of the land," because they interfere with private rights, all other acts, interfering with private rights, may, for ought we see, fall within the same principle; and what statute does not either directly or indirectly, interfere with private rights? The principle would probably make our whole statute book a dead letter. We cannot adopt it; but are clearly of opinion that these acts, if not repugnant to any other constitutional provision, are "the law of the land," within the true sense of the constitution.

But it is said, that the charter of 1769 is a contract, the validity of which is impaired by these acts, in violation of that clause in the tenth section of the first article of the constitution of the United States, which declares that "No state shall pass any law, impairing the obligation of contracts." It has probably never yet been decided, that a charter of this kind is a contract within the meaning of the constitution of the United States. None of the cases cited, were like the present. In the case of *Fletcher vs. Peck*,¹ there was an express contract, a conveyance of lands to individuals, for their own use. In the case of *New-Jersey vs. Wilson*,² there was also an express contract, a treaty, by which lands with a particular privilege annexed to the lands themselves, were granted to individuals for their own use, and upon a valuable consideration paid.

This clause, in the constitution of the United States, was obviously intended to protect private rights of property, and embraces all contracts relating to private property, whether executed or executory, and whether between individuals, between states, or between states and individuals. The word "contracts" must however be taken in its common and ordinary acceptation, as an actual agreement between parties, by which something is granted or stipulated, immediately for the benefit of the actual parties. But this clause was not intended to limit the power of the states, in relation to their own publick officers

¹ 6 Cranch, 87.

² 7 Cranch, 164.

and servants, or to their own civil institutions, and must not be construed to embrace contracts, which are, in their nature, mere matters of civil institution; nor grants of power and authority, by a state to individuals, to be exercised for purposes merely publick. Thus, marriage is a contract; but being a mere matter of civil institution, is not within the meaning of this clause. A law, therefore, authorizing divorces, though it impairs the validity of marriage contracts, is not a violation of the constitution of the United States. Thus too many of our penal statutes give a part of the penalties and forfeitures incurred under them, to particular individuals, and whenever a penalty or forfeiture is incurred, such individuals have a vested right to sue for and recover such forfeitures and penalties. But a repeal of those acts, at any time before an actual recovery, has always been held to divest this right.¹ Such repeal, therefore, clearly impairs the validity of the grant; but no one ever supposed that such grant was a contract within the meaning of this clause. In the case of the *Commonwealth vs. Bird*,² it was decided, that the legislature had a constitutional right to take away from individuals an exemption from military duty, acquired under existing laws; and it seems never to have occurred, either to counsel or the court, that the laws granting the exemption, were a contract within the meaning of this clause in the constitution. The legislature, both in this state and in Massachusetts, have always claimed and exercised the right of dividing towns; of enlarging or diminishing their territorial limits; of imposing new duties or limiting their powers and privileges, as the publick good seemed to require; and this without their consent. Yet this right seems never to have been called in question, on the ground that their charters were contracts, within the meaning of this clause. All our judges, justices of the peace, sheriffs, &c. hold their offices under grants from the governour and council, in pursuance of statutes. But who ever supposed that these grants were contracts within the meaning of this clause of the constitution of the United States. The distinction we have here endeavored to lay down, between the contracts which are, and which are not intended by that instrument, seems to us to be clear and obvious. If the charter of a publick institution, like that of Dartmouth College, is to be construed as a contract, within the intent of the constitution of the United States, it will, in our opinion, be difficult to say what powers, in relation to their publick institutions, if any, are left to the states. It is a construction, in our view, repugnant to the very principles of all government, because it places all the publick institutions of all the states beyond legislative controul. For it is clear that congress possesses no powers on the subject. We are therefore clearly of opinion, that the charter of Dartmouth College is not a contract, within the meaning of this clause in the constitution of the United States.

But admitting that charter to have been such a contract; what was

¹ 1 Gallison, 177. — 5 Cranch, 281. — And *Lewis vs. Foster*, Cheshire, May 1817.

² 12 Mass. Rep. 443.

the contract? Can it be construed to be a contract on the part of the king with the corporators, whom he appointed, and their successors, that they should forever have the controul of the affairs of this institution, and be forever free from all legislative interference, and that their number should not be augmented or diminished, however strongly the publick interest might require it? Such a contract, in relation to a publick institution, would, as we conceive, be absurd and repugnant to the principles of all government. The king had no power to make such a contract, and thus bind the sovereign authority on a subject of mere publick concern. Nor does our legislature possess the power to make such a contract. Had it been provided in the act of June, 1816, that the twenty-one trustees should forever have the exclusive controul of this institution, and that no future legislature should add to their number, does any one suppose such a provision would have been binding upon a future legislature? Or suppose the legislature should enact that the number of judges of this court should never be augmented: is it possible to suppose that such an act could abridge the power of a succeeding legislature on the subject? We think not. A distinction is to be taken between particular grants, by the legislature, of property or privileges to individuals, for their own benefit, and grants of power and authority to be exercised for publick purposes. The former is in its nature, special legislation, in relation to private rights; the latter is general legislation, in relation to the common interests of all. Chief Justice Marshall, in the case of *Fletcher vs. Peck*,¹ adverts to this distinction, where he says "the correctness of this principle, that one legislature cannot abridge the powers of a succeeding legislature so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested, is a fact and cannot cease to be a fact." We are therefore of opinion, that if this charter can be construed to be a contract within the meaning of the constitution of the United States; yet still it contains no contract binding on the legislature, that the number of trustees shall not be augmented, and that the validity of the contract is not impaired by these acts.

I have looked into this case with all the attention, of which I am capable, and with a most painful anxiety to discover the true principles, upon which it ought to be decided. No man prizes more highly than I do, the literary institutions of our country, or would go farther to maintain their just rights and privileges. But I cannot bring myself to believe, that it would be consistent with sound policy, or ultimately with the true interests of literature itself, to place the great publick institutions, in which all the young men, destined for the liberal professions, are to be educated, within the absolute controul of a few

¹ 6 Cranch, 135.

individuals, and out of the controul of the sovereign power — not consistent with sound policy, because it is a matter of too great moment, too intimately connected with the publick welfare and prosperity, to be thus entrusted in the hands of a few. The education of the rising generation is a matter of the highest publick concern, and is worthy of the best attention of every legislature. The immediate care of these institutions must be committed to individuals, and the trust will be faithfully executed so long as it is recollected to be a mere publick trust, and that there is a superintending power, that can and will correct every abuse of it. But make the trustees independent, and they will ultimately forget that their office is a publick trust — will at length consider these institutions as their own — will overlook the great purposes for which their powers were originally given, and will exercise them only to gratify their own private views and wishes, or to promote the narrow purposes of a sect or a party. It is idle to suppose that courts of law can correct every abuse of such a trust. Courts of law cannot legislate. There may be many abuses, which can be corrected by the sovereign power alone. Nor would such exemption from legislative controul be consistent with the true interests of literature itself, because these institutions must stand in constant need of the aid and patronage of the legislature and the publick; and without such aid and patronage, they can never flourish. Their prosperity depends entirely upon the publick estimation in which they are held. It is of the highest importance that they should be fondly cherished by the best affections of the people, that every citizen should feel that he has an interest in them, and that they constitute a part of that inestimable inheritance, which he is to transmit to his posterity in the institutions of his country. But these institutions, if placed in a situation to dispute the publick will, would eventually fall into the hands of men, who would be disposed to dispute it; and contests would inevitably arise, in which the great interests of literature would be forgotten. Those who resisted that will, would become at once the object of popular jealousy and distrust: their motives, however pure, would be called in question, and their resistance would be believed to have originated in private and interested views, and not in regard to the publick welfare. It would avail these institutions nothing that the publick will was wrong, and that their right could be maintained in opposition to it, in a court of law. A triumph there might be infinitely more ruinous than defeat. Whoever knows the nature of a popular government, knows that such a contest could not be thus settled by one engagement. Such a triumph would only protract the destructive contest. The last misfortune which can befall one of these institutions, is to become the subject of popular contention.

I am aware that this power in the hands of the legislature may, like every other power, at times be unwisely exercised; but where can it be more securely lodged? If those, whom the people annually elect to manage their publick affairs, cannot be trusted, who can? The people

have most emphatically enjoined it in the constitution, as a duty upon "the legislators and magistrates, in all future periods of the government, to cherish the interests of literature and the sciences and all seminaries and publick schools." And those interests will be cherished, both by the legislature and the people so long as there is virtue enough left to maintain the rest of our institutions. Whenever the people and their rulers shall become corrupt enough to wage war with the sciences and liberal arts, we may be assured that the time will have arrived, when all our institutions, our laws, our liberties must pass away, — when all that can be dear to freemen, or that can make their country dear to them, must be lost, and when a government and institutions must be established, of a very different character from those under which it is our pride and happiness to live.

In forming my opinion in this case, however, I have given no weight to any considerations of expediency. I think the legislature had a clear constitutional right to pass the laws in question. My opinion may be incorrect, and our judgment erroneous, but it is the best opinion, which upon the most mature consideration, I have been able to form. It is certainly, to me, a subject of much consolation, to know that if we have erred, our mistakes can be corrected, and be prevented from working any ultimate injustice. If the plaintiffs think themselves aggrieved by our decision, they can carry the cause to another tribunal, where it can be re-examined, and our judgment be reversed, or affirmed, as the law of the case may seem to that tribunal to require.

Let judgment be entered for the defendant.

After the entry of judgment for defendant, the plaintiffs sued out a writ of error to remove the cause to the Supreme Court of the United States, where it was entered at February Term, 1818. The assignment of errors is given in Farrar, pp. 235, 236.

The cause was argued before the U. S. Supreme Court in March, 1818, by *Webster* and *Hopkinson*, for plaintiffs in error; and by *Wirt*, attorney-general, and *Holmes*, for defendant in error.

At February Term, 1819, the judgment of the Court was pronounced by

MARSHALL, C. J. This is an action of trover, brought by the Trustees of Dartmouth College, against William H. Woodward, in the state court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June, and on the 18th of December, 1816, be valid, and binding on the trustees without their assent, and not repug-

nant to the constitution of the United States; otherwise it finds for the plaintiffs.

The superior court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a State is to be revised; an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the constitution of the United States, that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the same instrument they have also said, "that the judicial power shall extend to all cases in law and equity arising under the constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink.

The title of the plaintiffs originates in a charter, dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled, "An act to amend the charter, and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the State, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives of New Hampshire, and the governor and lieutenant governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated, that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction, every ingredient of a complete and legitimate contract is to be found.

The points for consideration are,

1. Is this contract protected by the constitution of the United States?

2. Is it impaired by the acts under which the defendant holds?

1. On the first point it has been argued, that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a State for State purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the State legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the constitution must, in con-

struction, receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any State legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property, may yet retain such an interest in the preservation of their own arrangements, as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever, may not assert all the rights which they possessed, while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives in the eye of the law, as to stand in their

place, not only as respects the government of the college, but also as respects the maintenance of the college charter, it becomes then the duty of the court most seriously to examine this charter, and to ascertain its true character.

From the instrument itself, it appears, that about the year 1754, the Rev. Eleazer Wheelock established, at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carrying on and extending his undertaking. In this pious work he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others, trustees of the money which had been and should be contributed; which appointment Dr. Wheelock confirmed by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut River, in the western part of New Hampshire; that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English; and the proprietors in the neighborhood having made large offers of land, on condition that the college should there be placed. Dr. Wheelock then applied to the crown for an act of incorporation; and represented the expediency of appointing those whom he had by his last will, named as trustees in America, to be members of the proposed corporation. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," &c., "and also of English youth, and any others," the charter was granted, and the trustees of Dartmouth College were by that name created a body corporate, with power, for the use of the said college, to acquire real and personal property, and to pay the president, tutors, and other officers of the college, such salaries as they shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power, by his last will, to appoint a successor, who is to continue in office until disapproved by the trustees. In case of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, being one of the trustees, shall exercise the office, until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body, by death, resignation, removal, or disability; and also to make orders, ordinances, and laws for the government of the college, the same not being repugnant to the laws of Great Britain, or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

This charter was accepted, and the property, both real and personal,

which had been contributed for the benefit of the college, was conveyed to, and vested in, the corporate body.

From this brief review of the most essential parts of the charter, it is apparent, that the funds of the college consisted entirely of private donations. It is, perhaps, not very important, who were the donors. The probability is, that the Earl of Dartmouth, and the other trustees, in England, were, in fact, the largest contributors. Yet the legal conclusion, from the facts recited in the charter, would probably be, that Dr. Wheelock was the founder of the college.

The origin of the institution was, undoubtedly, the Indian charity school, established by Dr. Wheelock, at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees, who received the money, were appointed by, and act under, his authority. It is not too much to say, that the funds were obtained by him, in trust, to be applied by him, to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him in his last will, as the trustees of his charity school, compose a part of the corporation, and he is declared to be the founder of the college, and its president for life. Were the inquiry material, we should feel some hesitation in saying, that Dr. Wheelock was not, in law, to be considered as the founder (1 Bl. Com. 481) of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn; and these salaries lessen the expense of education to the students. It is then an eleemosynary, (1 Bl. Com. 471) and, as far as respects its funds, a private corporation.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?

That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Dr. Wheelock, as the keeper of his charity school, instructing the

Indians in the art of reading, and in our holy religion; sustaining them at his own expense, and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have supposed that his private funds, or those given by others, were subject to legislative management, because they were applied to the purposes of education. When afterwards his school was enlarged, and the liberal contributions made in England and in America, enabled him to extend his cares to the education of the youth of his own country, no change was wrought in his own character, or in the nature of his duties. Had he employed assistant tutors with the funds contributed by others, or had the trustees in England established a school, with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact that they were employed in the education of youth, could not have converted them into public officers, concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust, uncontrolled by legislative authority.¹

Whence, then, can be derived the idea, that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public, for public objects? Not from the source whence its funds were drawn; for its foundation is purely private and eleemosynary. Not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it

¹ See *Cary Library v. Bliss*, A. D. 1830, 151 Mass. 364. — Ed.

was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a State instrument, than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law, for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason.

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration, of the grant. In most eleemosynary institutions, the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable, or public spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design, securely and certainly, without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument, which is to execute their designs, the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund, for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government,

created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the incorporating act change the character of a private eleemosynary institution.

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted, that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an act of incorporation, proceeds thus: "Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and, also, that the best means of education be established in our province of New Hampshire, for the benefit of said province, do, of our special grace," &c. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate, that the "benefit intended for the province" is that which is derived from "establishing the best means of education therein;" that is, from establishing in the province Dartmouth College, as constituted by the charter. But if these words, considered alone, could admit of doubt, that doubt is completely removed by an inspection of the entire instrument.

The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these, New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was "most subservient to the great ends in view," and because liberal donations of land were offered by the proprietors, on condition that the institution should be there established. The real advantages from the location of the college, are, perhaps, not less considerable to those on the west, than to those on the east side of Connecticut River. The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth, and any others." So that the objects of the contributors, and the incorporating act, were the same; the promotion of Christianity, and of education generally, not the interests of New Hampshire particularly.

From this review of the charter, it appears, that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the constitution intended to withdraw from the power of State legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the constitution is solicitous, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him and them to perpetuate their beneficent intention. It was granted. An artificial, immortal being was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in

their place, and distributes their bounty, as they would themselves have distributed it had they been immortal. So with respect to the students who are to derive learning from this source, the corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount, collectively, to a most important interest. These are, in the aggregate, to be exercised, asserted, and protected, by the corporation. They were as completely out of the donors, at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said, that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees, and the crown, (to whose rights and obligations New Hampshire succeeds,) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the convention,

when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the constitution not warranted by its words? Are contracts of this description of a character to excite so little interest, that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration, as to compel us, or rather permit us to say, that these words, which were introduced to give stability to contracts, and which, in their plain import, comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them. Religion, charity, and education, are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States, that contracts for their benefit must be excluded from the protection of words which, in their natural import, include them? Or do such contracts so necessarily require new modelling by the authority of the legislature, that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration?

All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited, proves that they are not. The framers of the constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science, by reserving to the government of the Union the power "to promote the progress of science and useful arts,

by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries. They have, so far, withdrawn science and the useful arts, from the action of the State governments. Why, then, should they be supposed so regardless of contracts made for the advancement of literature, as to intend to exclude them from provisions, made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the constitution, neither, as we conceive, is the policy of leaving them subject to legislative alteration, so apparent as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations, which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind, to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our constitution were strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy and repeated interferences produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful, to justify the construction which makes it.

The motives suggested at the bar, grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption, that, if allowed to continue themselves, they now are, and must remain forever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the legislature.

It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must, necessarily, partake of the spirit of their

origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college, and to guide the students. Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter by the crown; but at whose suggestion were they named? By whom were they selected? The charter informs us. Dr. Wheelock had represented, "that, for many weighty reasons, it would be expedient, that the gentlemen whom he had already nominated, in his last will, to be trustees in America, should be of the corporation now proposed." When, afterwards, the trustees are named in the charter, can it be doubted that the persons mentioned by Dr. Wheelock, in his will, were appointed? Some were probably added by the crown, with the approbation of Dr. Wheelock. Among these is the doctor himself. If any others were appointed at the instance of the crown, they are the governor, three members of the council, and the speaker of the house of representatives, of the colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the crown. If, in the Revolution that followed, they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation which suspicion might excite, would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evidence which we possess of the character of Dr. Wheelock, is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion, that he united a sound understanding to that humanity and benevolence which suggested his undertaking. It surely cannot be assumed, that his trustees were selected without judgment. With as little probability can it be assumed, that, while the light of science and of liberal principles pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that, while the human race is rapidly advancing, they are stationary. Reasoning *à priori*, we should believe that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors; men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the constitution, which should exclude these contracts from the protection of a provision whose terms comprehend them.

The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired, without violating the constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this court.

2. We next proceed to the inquiry, whether its obligation has been impaired by those acts of the legislature of New Hampshire, to which the special verdict refers.

From the review of this charter, which has been taken, it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown, it was expressly stipulated that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract, the crown was bound, and could have made no violent alteration in its essential terms, without impairing its obligation.

By the Revolution, the duties as well as the powers of government devolved on the people of New Hampshire. It is admitted, that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts and rights, respecting property, remained unchanged by the Revolution. The obligations, then, which were created by the charter to Dartmouth College, were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present constitution of the United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature, to be found in the constitution of the State. But the constitution of the United States has imposed this additional limitation, that the legislature of a State shall pass no act "impairing the obligation of contracts."

It has been already stated, that the act "to amend the charter, and enlarge and improve the corporation of Dartmouth College," increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the State, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law, two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of

this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the State. The will of the State is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave, to the objects for which those funds were given; they contracted also, to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized; and reorganized in such a manner, as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.

In the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet it is not clear, that the trustees ought to be considered as destitute of such beneficial interest in themselves, as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea that trustees may also be tutors, with salaries. The first president was one of the original trustees; and the charter provides, that in case of vacancy in that office, "the senior professor or tutor, being one of the trustees, shall exercise the office of president, until the trustees shall make choice of, and appoint a president." According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted, that those contracts only are protected by the constitution, a beneficial interest in which is vested in the party who appears in court to assert that interest; yet it is by no means clear, that the Trustees of Dartmouth College have no beneficial interest in themselves.

But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States, and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the state court must, therefore, be reversed.

WASHINGTON J. and STORY J. delivered opinions, concurring in the above result. Their opinions are reported both in Wheaton and in Farrar. JOHNSON J. and LIVINGSTON J. concurred. DUVALL J. dissented. TODD J. was absent.

SECTION II.

*Extent of Police Power, where Charter does not contain any Express Reservation of Power.*¹

THORPE v. RUTLAND AND BURLINGTON R. CO.

1855. 27 *Vermont*, 141.²

ACTION ON THE CASE to recover damages for sheep of the plaintiff killed by one of the defendants' locomotives, upon their railroad track, where said sheep had escaped in consequence of there being no cattle-guard at a farm crossing, across the defendants' railroad on the plaintiff's land in Charlotte. The only question reserved at the trial in the county court was, whether the defendants were bound by the provision in the general railroad act of 1849, requiring railroad companies to construct and maintain cattle-guards;³ there being no such obligation imposed upon the defendants by their charter, which was granted in 1843.

The county court, November Term, 1854, — PECK, J., presiding, — decided and instructed the jury that the defendants were bound by said provision, to which the defendants excepted.

D. A. Smalley, for defendants.

J. Maeck, for plaintiff.

REDFIELD, C. J. I. The present case involves the question of the right of the legislature to require existing railways to respond in damages for all cattle killed or injured by their trains until they erect suitable cattle-guards at farm-crossings. No question could be made where

¹ The selections in this section are not intended as a basis for discussing the general subject of the police power; a topic more appropriately classed under constitutional law. These cases are inserted here as bearing upon the narrower question: What, if any, differences between the application of the police power to corporations and its application to individuals conducting similar business?

In some corporation cases occasionally cited as authorities on the limits of the police power, it will be found that the decision upholding certain legislation was actually based upon the existence of a reserved legislative power to amend the charter. For cases bearing upon the limits of the reserved power to amend, see *post*, Section IV. of this chapter. — ED.

² Arguments omitted. — ED.

³ Which is in these words: "Each railroad corporation shall erect and maintain fences on the lines of their road, . . . and also construct and maintain cattle-guards at all farm and road crossings, suitable and sufficient to prevent cattle and animals from getting on to the railroad. Until such fences and cattle-guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon, if occasioned by want of such fences and cattle-guards." — (Comp. Stat. 200, § 41.)

such a requisition was contained in the charter of the corporation, or in the general laws of the state at the date of the charter. But where neither is the case, it is claimed that it is incompetent for the legislature to impose such an obligation by statute, subsequent to the date of the charter.

It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British parliament, except where they are restrained by written constitutions.

II. It being assumed, then, that the legislature may control the action, prescribe the functions and duties of corporations, and impose restraints upon them to the same extent as upon natural persons, that is, in all matters coming within the general range of legislative authority, subject to the limitation of not impairing the obligation of contracts, provided the essential franchise is not taken without compensation, it becomes of primary importance to determine the extent to which the charter of a corporation may fairly be regarded as a contract within the meaning of the United States constitution.

Upon this subject, the decisions of the United States supreme court must be regarded as of paramount authority. And the case of *Dartmouth College v. Woodward*, being so much upon the very point now under consideration, and the leading case, and authoritative exposition of the court of last resort upon that subject, must be considered as the common starting point, the point of divergence, so to speak, of all the contrariety of opinion in regard to it.

Mr. Chief Justice MARSHALL there says, "a corporation is an artificial being—the mere creature of the law—it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." The decision throughout treats this as the fundamental idea, the pivot upon which the case turns. The charter of a corporation is thus regarded as a contract, inasmuch as it is an implied undertaking on the part of the state, that the corporation, as such, and for the purposes therein named or implied, shall enjoy the powers and franchises by its charter conferred. And any statute essentially modifying these corporate franchises is there regarded as a violation of the charter. But when we come to inquire what is meant by the franchises of a corporation, the principal difficulty arises. Certain things, it is agreed are essential to the beneficial existence and successful operation of a corporation, such as individuality and perpetuity, when the grant is unlimited; the power to sue and to be sued, to have a common seal and to contract; and in the case of a railroad, to have a common stock to construct and maintain its road, and to operate the same for the common benefit of the corporators. Certain other things, as incident to the beneficial use of these franchises, are necessarily implied. But there is a wide field of debateable ground outside of all these. It is conceded that the powers

expressly, or by necessary implication, conferred by the charter, and which are essential to the successful operation of the corporations are inviolable.¹

But it has sometimes been supposed that corporations possess a kind of immunity and exemption from legislative control, extending to everything materially affecting their interest, and where there is no express reservation in their charters. It was upon this ground that a perpetual exemption from taxation was claimed in *Providence Bank v. Billings*, 4 Peters, 514, their charter being general, and no power of taxation reserved to the state. The argument was, that the right to tax either their property or their stock was not only an abridgment of the beneficial use of the franchise, but if it existed, was capable of being so exercised as virtually to destroy it. This was certainly plausible, and the court do not deny the liability to so exercise the power of taxation as to absorb the entire profits of the institution. But still they deny the exemption claimed. Chief Justice MARSHALL there says: "The great object of an incorporation is, to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, *but must be expressed in it, or they do not exist.*"

This is sufficiently explicit, and upon examination will be found, I think, to have placed the matter upon its true basis. In reason, it would seem that no fault could be found with the rule here laid down by the great expounder of American constitutional law. As to the general liability to legislative control, it places natural persons and corporations precisely upon the same ground. And it is the true ground, and the only one upon which equal rights and just liabilities and duties can be fairly based.

To apply this rule to the present case, it must be conceded that all which goes to the constitution of the corporation and its beneficial operation is granted by the legislature, and can not be revoked, either directly or indirectly, without a violation of the grant, which is regarded as impairing the contract, and so prohibited by the United States constitution. And if we suppose the legislature to have made the same grant to a natural person which they did to defendants, which they may undoubtedly do, *Moor v. Veasie*, 32 Maine 343; S. C. in error in the Sup. Ct. U. S., 4 Peters 568, it would scarcely be supposed that they thereby parted with any general legislative control over such person, or the business secured to him. Such a supposition, when applied to a single natural person, sounds almost absurd. But it

¹ The supreme court of Ohio, in *Mechanics' and Traders' Bank v. Debolt*, 1 Ohio, 591, have even denied this, and in argument assume the right of the legislature to repeal the charter of banking corporations. So, also, in *Toledo Bank v. Bond*, *Ibid.*, 622. But these cases involve only the right of the legislature to grant away, permanently, for a consideration, the right of taxation, which seems to me not to involve the general question.

must, in fact, be the same thing when applied to a corporation, however extensive. In either case, the privilege of running the road, and taking tolls, or fare and freight, is the essential franchise conferred. Any act essentially paralyzing this franchise, or destroying the profits therefrom arising, would no doubt be void. But beyond that, the entire power of the legislative control resides in the legislature, unless such power is expressly limited in the grant to the corporation, as by exempting their property from taxation, in consideration of a share of the profits, or a bonus, or the public duties assumed. And it has been questioned how far one legislature could, in this manner, abridge the general power of every sovereignty to impose taxes to defray the expense of public functions.

But in the present case the question arises upon the statute of 1850, requiring all railways in the state to make and maintain cattle-guards at farm crossings, and until they do so, making them liable for damage done to cattle by their engines, by reason of defect of fences or cattle-guards. The defendant's charter required them to fence their road, but no express provision is made in regard to cattle-guards. There is no pretense of any express exemption in the charter upon this subject, or that such an implied exemption can fairly be said to form a condition of the act of incorporation, unless everything is implied by grant, which is not expressly inhibited, whereas the true rule of construction in regard to the powers of corporations is, that they are to take nothing by intendment, but what is necessary to the enjoyment of that which is expressly granted.

But the present case resolves itself into the narrow question of the right of the legislature, by general statute to require all railways, whether now in operation, or hereafter to be chartered, or built, to fence their roads upon both sides, and provide sufficient cattle-guards at all farm and road-crossings, under penalty of paying all damage caused by their neglect to comply with such requirements. It might be contended that cattle-guards are a necessary part of the fence at all crossings, but that has been questioned, and we think the matter should be decided upon the general ground. It was supposed that the question was settled by this court, in *Nelson v. V. & C. R. Co.*, 26 Vt. 717. The general views of the court are there stated as clearly as it could now be done, but as the general question is of vast importance, both to the roads and the public, and has again been urged upon our consideration, we have examined it very much in detail.

We think the power of the legislature to control existing railways in this respect, may be found in the general control over the police of the country, which resides in the law-making power in all free states, and which is, by the fifth article of the bill of rights of this state, expressly declared to reside perpetually and inalienably in the legislature, which is, perhaps, no more than the enunciation of a general principle applicable to all free states, and which cannot, therefore be violated so as to

deprive the legislature of the power, even by express grant to any mere public or private corporation. And when the regulation of the police of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railroads to be carried into effect by their by-laws and other regulations, it is, of course always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of, if they would.

This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alienum non laedas*, which being of universal application, it must of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. So far as railroads are concerned, this police power which resides primarily and ultimately in the legislature, is two-fold: 1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes, and by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, of which they are to judge, and in all doubtful cases their judgment is final, require the several railroads in the state to establish and maintain the same kind of police which is now observed upon some of the more important roads in the country for their own security, or even such a police as is found upon the English railways, and those upon the continent of Europe. No one ever questioned the right of the Connecticut legislature to require trains upon all their railroads to come to a stand before passing draws in bridges; or of the Massachusetts legislature to require the same thing before passing another railroad. And by parity of reason may all railways be required so to conduct themselves, as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances.

There would be no end of illustrations upon this subject, which, in the detail are more familiar to others than to us. It may be extended to the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety beams in case of the breaking of axle-trees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be. *Hegeman v. Western R. Co.*, 16 Barbour, 353.

2. There is also the general police power of the state, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state, of the perfect right, in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same in regard to railways should be made a serious question. This objection is made generally upon two grounds: 1. That it subjects corporations to virtual destruction by the legislature; and 2. That it is an attempt to control the obligation of one person to another, in matters of merely private concern.

The first point has already been somewhat labored. It is admitted that the essential franchise of a private corporation is recognized by the best authority as private property, and cannot be taken without compensation, even for public use. *Armington v. Barnet*, 15 Vt. 745; *West River Bridge Co. v. Dix*, 16 Vt. 446; S. C. in error in the United States Sup. Ct.; 6 Howard, 507; 1 Shelford (Bennett's ed.) 441, and cases cited.

All the cases agree that the indispensable franchises of a corporation cannot be destroyed or essentially modified. This is the very point upon which the leading case of *Dartmouth College v. Woodward* was decided, and which every well considered case in this country maintains. But when it is attempted upon this basis to deny the power of regulating the internal police of the railroads, and their mode of transacting their general business, so far as it tends unreasonably to infringe the rights or interests of others, it is putting the whole subject of railway control quite above the legislation of the country. Many analogous subjects may be adduced to show the right of legislative control over matters chiefly of private concern. It was held, that a statute making the stockholders of existing banks liable for the debts of the bank was a valid law as to debts thereafter contracted, and binding to that extent, upon all stockholders, subsequent to the passage of the law. *Stanley v. Stanley*, 26 Maine, 191. But where a bank was chartered with power to receive money on deposit, and pay away the same, and to discount bills of exchange, and make loans, and a statute of the state subsequently made it unlawful for any bank in the state to transfer by endorsement or otherwise, any bill or note, etc., it was held that the act was void, as a violation of the contract of the state with the bank in granting its charter. *Planters' Bank v. Sharp*, and *Baldwin v. Payne*, 6 Howard, 301, 326, 327, 332; *Jameson v. Planters' and Merchants' Bank*, 23 Alabama, 168. It is true that any statute destroying the business or profits of a bank, and equally of a railroad, is void. Hence a statute prohibiting banks from taking interest, or discounting bills or notes, would be void, as striking at the very foundation of the general objects and beneficial purposes of the charter. But a general statute reducing the rate of interest, or punishing usury, or prohibiting

speculations in exchange or in depreciated paper, or the issuing of bills of a given denomination, or creating other banks in the same vicinity. have always been regarded as valid. And while it is conceded the legislature could not prohibit existing railways from carrying freight or passengers, it is believed that beyond all question, it may so regulate these matters as to impose new obligations and restrictions upon these roads materially affecting their profits, as by not allowing them to run in an unsafe condition, as was held as to turnpikes, *State v. Bosworth*, 13 Vt. 402. But a law allowing certain classes of persons to go toll free is void, *Pingrey v. Washburn*, 1 Aiken, 268. So, too, chartering a railroad along the same route of a turnpike is no violation of its rights, *White River Turnpike Co. v. Vermont Cent. R. Co.*, 21 Vt., 590; *Turnpike Co. v. Railway Co.*, 10 Gill & Johnson, 392; or chartering another railway along the same route of a former one, to whom no exclusive rights are granted in terms, *Matter of Hamilton Avenue*, 14 Barbour, 405; or the establishment of a free way by the side of a toll bridge, *Charles River Bridge v. Warren Bridge*, 11 Peters, 420.

The legislature may, no doubt, prohibit railroads from carrying freight which is regarded as detrimental to the public health or morals, or the public safety generally, or they might probably be made liable as insurers of the lives and limbs of passengers as they virtually are of freight. The late statute, giving relatives the right to recover damages where a person is killed, has wrought a very important change in the liability of railways, ten times as much, probably, as the one now under consideration ever could do. And I never knew the right of the legislature to impose the liability to be brought in question.

But the argument that these cattle-guards at farm-crossings are of so private a character as not to come within the general range of legislative cognizance, seems to me to rest altogether upon a misapprehension. It makes no difference how few or how many persons a statute will be likely to affect. If it professes to regulate a matter of public concern, and is in its terms general, applying equally to all persons or property coming within its provisions, it makes no difference in regard to its character or validity, whether it will be likely to reach one case or ten thousand.

So, too, a statute requiring division fences between adjoining land proprietors, to be built of a given height or quality, although differing from the former law, would bind natural persons and equally corporations. But a statute requiring land owners to build *all their fences* of a given quality or height, would no doubt be invalid, as an unwarrantable interference with matters of exclusively private concern. But the farm-crossings upon a railway are by no means of this character. They are division fences between adjoining occupants, to all intents. In addition to this, they are the safeguards which one person, in the exercise of a dangerous business, is required to maintain in order to prevent the liability to injure his neighbor. This is a control by legis-

lative action coming within the obligation of the maxim, *Sic utere tuo*, and which has always been exercised in this manner in all free states, in regard to those whose business is dangerous and destructive to other persons, property or business. Slaughter-houses, powder-mills, or houses for keeping powder, unhealthy manufactories, the keeping of wild animals, and even domestic animals, dangerous to persons or property, have always been regarded as under the control of the legislature. It seems incredible how any doubt should have arisen upon the point now before the court. And it would seem it could not, except from some undefined apprehension, which seems to have prevailed to a considerable extent, that a corporation did possess some more exclusive powers and privileges upon the subject of its business, than a natural person in the same business, with equal power to pursue and to accomplish it, which, I trust, has been sufficiently denied.

I do not now perceive any just ground to question the right of the legislature to make railways liable for all cattle killed by their trains. It might be unjust or unreasonable, but none the less competent. *Girtman v. Central Railroad*, 1 Kelly, (Georgia) 173, is sometimes quoted as having held a different doctrine, but no such point is to be found in the case. The British parliament for centuries, and most of the American legislatures, have made the protection of the lives of domestic animals, the subject of penal enactment. It would be wonderful if they could not do the same as to railways or if they could not punish the killing, by requiring them to compensate the owner, or, as in the present case, to do it until they used certain precautions in running their trains, to wit, maintained cattle-guards at roads and farm-crossings.

There are some few cases in the American courts bearing more directly upon the very point before us.

We conclude, then, that the authority of the legislature to make the requirement of existing railways may be vindicated, because it comes fairly within the police of the state; 2. Because it regards the division fence between adjoining proprietors; 3. Because it properly concerns the safe mode of exercising a dangerous occupation or business; and 4. Because it is but a reasonable provision for the protection of domestic animals, all of which interests fall legitimately within the range of legislative control, both in regard to natural and artificial persons. Judgment affirmed.¹

BENNETT, J., dissenting.

¹ A note, referring to authorities on "analogous subjects," is omitted. — ED.

BOSTON BEER COMPANY v. MASSACHUSETTS.

1877. 97 U. S. 251

ERROR to the Superior Court of the Commonwealth of Massachusetts.

This was a proceeding in the Superior Court of Suffolk County, Massachusetts, for the forfeiture of certain malt liquors, belonging to the Boston Beer Company, and which had been seized as it was transporting them to its place of business in said county, with intent there to sell them in violation of an act of the legislature of Massachusetts, passed June 19, 1869, c. 415, commonly known as the Prohibitory Liquor Law. The company claimed that, under its charter, granted in 1828, it had the right to manufacture and sell said liquors; and that said law impaired the obligation of the contract contained in that charter, and was void, so far as the liquors in question were concerned. The court refused to charge the jury to that effect, and a verdict was found against the claimant. The rulings of the Superior Court having been affirmed by the Supreme Judicial Court of the Commonwealth, the company brought the case here. The statutes of Massachusetts bearing on the case are referred to in the opinion of the court.

H. W. Paine and *F. O. Prince*, for plaintiff in error.

Charles R. Train, for defendant in error.

BRADLEY, J. The question raised in this case is, whether the charter of the plaintiff, which was granted in 1828, contains any contract the obligation of which was impaired by the prohibitory liquor law of Massachusetts, passed in 1869, as applied to the liquor in question in this suit.

As before stated, the charter of the plaintiff in error was granted in 1828, by an act of the legislature passed on the 1st of February in that year, entitled "An Act to incorporate the Boston Beer Company." This act consisted of two sections. By the first, it was enacted that certain persons (named), their successors and assigns, "be, and they hereby are, made a corporation, by the name of The Boston Beer Company, for the purpose of manufacturing malt liquors in all their varieties, in the city of Boston, and for that purpose shall have all the powers and privileges, and be subject to all the duties and requirements, contained in an act passed on the third day of March, A.D. 1809, entitled 'An Act defining the general powers and duties of manufacturing corporations,' and the several acts in addition thereto." The second section gave the company power to hold such real and personal property to certain amounts, as might be found necessary and convenient for carrying on the manufacture of malt liquors in the city of Boston.

¹ Arguments and portions of opinion omitted. — ED.

The general manufacturing act of 1809, referred to in the charter, had this clause, as a proviso of the seventh section thereof: "*Provided always*, that the legislature may from time to time, upon due notice to any corporation, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal any act or part thereof, establishing any corporation, as shall be deemed expedient."

[The company contended that the power reserved to the legislature in the Act of 1809 was revoked or surrendered by a subsequent Act, passed in 1829. The learned Judge held, that this contention could not be sustained. The opinion then proceeds as follows :]

If this view is correct, the legislature of Massachusetts had reserved complete power to pass any law it saw fit, which might affect the powers of the plaintiff in error.

But there is another question in the case, which, as it seems to us, is equally decisive.

The plaintiff in error was incorporated "for the purpose of manufacturing malt liquors in all their varieties," it is true; and the right to manufacture, undoubtedly, as the plaintiff's counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor; nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State.

We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of *Bartemeyer v. Iowa* (18 Wall. 129), was not in existence when the liquor law of Massachusetts was passed. Had the plaintiff in error relied on the existence of the property prior to the law, it behooved it to show that fact. But no such fact is shown, and no such point is taken. The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer for ever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights.

Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it

does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boyd v. Alabama*, 94 U. S. 645.

Since we have already held, in the case of *Bartemeyer v. Iowa*, that as a measure of police regulation, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts.

Of course, we do not mean to lay down any rule at variance with what this court has decided with regard to the paramount authority of the Constitution and laws of the United States, relating to the regulation of commerce with foreign nations and among the several States, or otherwise. *Brown v. Maryland*, 12 Wheat. 419; *License Cases*, 5 How. 504; *Passenger Cases*, 7 id. 283; *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, id. 275; *Railroad Company v. Husen*, 95 id. 465. That question does not arise in this case.

Judgment affirmed.

CHICAGO, BURLINGTON, AND QUINCY R. R. CO. v. IOWA.

1876. 94 U. S. 155.¹

APPEAL from the Circuit Court of the United States for the District of Iowa.

This bill was filed by the Chicago, Burlington, and Quincy Railroad Company, a corporation created by the laws of Illinois, for an injunction restraining the Attorney-General of the State of Iowa from prosecuting suits against it or its officers, under the provisions of an act passed by the legislature of Iowa, entitled "An Act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this State," approved March 23, 1874.

The complainant is the lessee of the Burlington and Missouri River Railroad in the State of Iowa; the two roads being connected by a bridge which crosses the Mississippi River at Burlington, thus making a continuous and uninterrupted line of railroad from Chicago, Ill., to Plattsmouth, on the Missouri River, Iowa.

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

In constructing its road, the Burlington and Missouri River Railroad Company executed sundry mortgages upon its property, &c., which are still outstanding.

On Dec. 31, 1872, that company leased its road and branches, with all their fixtures, appurtenances, and equipments of every kind, and all their franchises and privileges, to the complainant in perpetuity, and delivered possession thereof.

By the lease, the complainant covenanted among other things to pay all the indebtedness, both principal and interest, of the lessor corporation; and also to make to the stockholders of the lessor corporation the same amount of dividends per share that it should make to its own stockholders.

The complainant claims, that, under the provisions of the laws of Iowa, which existed and were in force when the Burlington and Missouri River Railroad Company was organized, and when the money with which its road and branches were built and equipped, was borrowed, and the mortgages to secure the payment thereof were executed, the company had the right to fix, determine, and establish the tariff of rates, for the transportation of freight and passengers over its road and branches, and that it has always heretofore exercised that right, without question of its power and authority to do so; that this right, power, and privilege were, by the lease aforesaid, assigned, set over, and transferred to the complainant, and that it has, ever since the lease, exercised the power, without question of its right to do so; that, in the exercise of such power, it has fixed and adjusted the tariff of charges for the transportation of persons and property over the road and branches, with a view to furnishing to the country the greatest facilities of transportation, and at the lowest rates, compatible with the duty of the complainant to keep the roads in good condition and repair, and provided with the necessary depots, freight-houses, machine-shops, engines, cars, &c., to meet the demands of business, and to provide the means of defraying the expenses of operating the roads, paying the interest upon the indebtedness, and earning reasonable dividends for the stockholders; and that the earnings of the roads, under the operation of the tariff so established, have been barely adequate, under careful and economical management, to such purposes; and that these ends cannot be attained if the complainant shall be deprived of its just and lawful right to fix its tariff of charges, and be compelled to conform to the act in question.

The answer, so far as material to the present purpose, admits most of the allegations of the bill, but denies that the Burlington and Missouri River Railroad Company, either by the charter or the laws of Iowa, had the exclusive right and power to fix its rates of fare, and denies that any attempt is to be made to enforce the law, so far as regards inter-state commerce.

On hearing, the court rendered a decree denying the injunction, and dismissing the bill; from which decree complainant appealed.

O. H. Browning and F. T. Frelinghuysen, for appellant.

M. E. Cutts, Attorney-General of Iowa, *contra*.

WAITE, C. J. Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in *Munn v. Illinois*, *supra*, p. 113, subject to legislative control as to their rates of fare and freight, unless protected by their charters.

The Burlington and Missouri River Railroad Company, the benefit of whose charter the Chicago, Burlington, and Quincy Railroad Company now claims, was organized under the general corporation law of Iowa, with power to contract, in reference to its business, the same as private individuals, and to establish by-laws and make all rules and regulations deemed expedient in relation to its affairs, but being subject, nevertheless, at all times to such rules and regulations as the general assembly of Iowa might from time to time enact and provide. This is, in substance, its charter, and to that extent it is protected as by a contract; for it is now too late to contend that the charter of a corporation is not a contract within the meaning of that clause in the Constitution of the United States which prohibits a State from passing any law impairing the obligation of a contract. Whatever is granted is secured subject only to the limitations and reservations in the charter or in the laws or constitutions which govern it.

This company, in the transactions of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit, and make it a part of the charter; and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference. But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation.

It is a matter of no importance that the power of regulation now under consideration was not exercised for more than twenty years after this company was organized. A power of government which actually exists is not lost by non-user. A good government never puts forth its extraordinary powers, except under circumstances which require it. That government is the best which, while performing all its duties, interferes the least with the lawful pursuits of its people.

In 1691, during the third year of the reign of William and Mary, Parliament provided for the regulation of the rates of charges by common carriers. This statute remained in force, with some amendment, until 1827, when it was repealed, and it has never been re-enacted. No one supposes that the power to restore its provisions has been lost. A change of circumstances seemed to render such a regulation no longer necessary, and it was abandoned for the time. The power was not surrendered. That remains for future exercise, when required. So here, the power of regulation existed from the beginning, but it was not exercised until in the judgment of the body politic the condition of things was such as to render it necessary for the common good.

Neither does it affect the case that before the power was exercised the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. After the pledge and after the lease the property remained within the jurisdiction of the State, and continued subject to the same governmental powers that existed before.

The objection that the statute complained of is void because it amounts to a regulation of commerce among the States, has been sufficiently considered in the case of *Munn v. Illinois*. This road, like the warehouse in that case, is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in State as well as in inter-state commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected.

It remains only to consider whether the statute is in conflict with sect. 4, art. 1, of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The statute divides the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires.

[Omitting remainder of opinion.]

Decree affirmed.

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented.

¹ It has since been held, that the courts have power to inquire whether the rates of transportation, established by a legislature or a commission, are unreasonable; and also have power to restrain the enforcement of the rates, if found to be unreasonable. *Reagan v. Farmers' L. & T. Co.*, A. D. 1894, 154 U. S. 362. — ED.

EAGLE INSURANCE CO. v. OHIO.

1894. 153 U. S. 446.¹

ERROR to the Supreme Court of the State of Ohio.

The Insurance Company, plaintiff in error, was incorporated on March 22, 1850, by an act of the General Assembly of Ohio, 48 Ohio Laws, 498. Sections 3654 and 3655 of the Revised Statutes of Ohio, [enacted subsequently to the charter], require, in substance, that the officers of each insurance company, organized under any law of the State, shall annually furnish statements of the condition of the company in numerous specified particulars, concerning assets, liabilities, expenditures, dividends, policies in force, &c. The statute prescribes penalties for non-compliance.

Under these sections proper blanks were furnished to the company by the State Superintendent of Insurance, and on its refusal to make the returns required by law, proceedings by mandamus were begun against it. The defence was that the above provisions impaired the obligation of the contract which grew out of its charter. Upon the decision of the Supreme Court of the State making the writ peremptory, the case was brought here by writ of error.

Thomas H. Kelly (*John F. Follett* with him), for plaintiffs in error.

J. K. Richards, Attorney General of Ohio, filed a brief for defendant in error, but the court declined to hear him.

WHITE, J. [After stating the case.] The only question presented is whether or not the charter of the plaintiff in error exempted it from obligation to comply with the subsequently established police regulations of the State, contained in sections 3654 and 3655 of the Revised Statutes of Ohio. This subject was fully considered by this court in the case of *The Chicago Life Insurance Company v. Needles*, 113 U. S. 574. There the company had been chartered by the State of Illinois to carry on a life insurance business, and the question was whether subsequently enacted police regulations of that State for the inspection of such business, and for the liquidation thereof, in the event of insolvency, could be enforced against a corporation working under a prior charter without impairing the obligation of the contract. The statute considered in the *Needles* case authorized the Auditor, whenever the actual funds of any life insurance company doing business in the State were not of a net value equal to the net value of its policies, according to the "combined experience" or "actuaries' rate of mortality, with interest at four per cent, to give notice to such company and its agent to discontinue issuing policies in the State until such time as its funds should become equal to its liabilities, valuing its policies as aforesaid. The law, in addition, required every life insurance company incorpo-

¹ Statement abridged. — ED.

rated in Illinois to transmit to the Auditor on or before the 1st day of March in each year a sworn statement of its business standing and affairs, in the form prescribed and authorized by law. It also empowered the officer to address inquiries to any company in relation to its "doings and condition," and any other matter connected with its transactions, which inquiries, it provided, should be "promptly answered;" and it imposed upon him the duty of making an examination of the condition and affairs of any company, whenever he deemed it expedient to do so, and had reason to suspect the correctness of any annual statement, or that the company was in an unsound condition. By another statute it was provided that if, upon examination of the affairs of any insurance company, the Auditor should conclude that it was insolvent, or that its further continuance in business would be hazardous to the insured or the public, he should apply by petition to the judge of any Circuit Court for an injunction restraining the company from proceeding with its business until further hearing, etc. Upon the case as thus presented, the court said:

"The case upon the merits, so far as they involve any question of which this court may take cognizance, is within a very narrow compass. The main proposition of the counsel is that the obligation of the contract which the company had with the State, in its original and amended charter, will be impaired, if that company be held subject to the operation of subsequent statutes regulating the business of life insurance and authorizing the courts, in certain contingencies, to suspend, restrain, or prohibit insurance companies incorporated in Illinois from further continuance in business. This position cannot be sustained consistently with the power which the State has, and, upon every ground of public policy, must always have over corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the company's charter. The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the State in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. *Terrett v. Taylor*, 9 Cranch, 43, 51; *Angell & Ames on Corporations*, 9th ed. paragraph 774, note.

"Equally implied, in our judgment, is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created. *Sinking Fund Cases*, 99 U. S. 68, 70; *Commonwealth v. Farmers' & Mechan-*

ics' Bank, 21 Pick. 542; *Commercial Bank v. Mississippi*, 4 Sm. & Marsh. 497, 503. If this condition be not necessarily implied, then the creation of corporations, with rights and franchises which do not belong to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are entrusted. It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all."

These views are decisive of the issue here. An attempt is made to distinguish that case from this upon the ground that, in the former, the proceedings were for the purpose of compelling the company to cease from business because of insolvency; while, in this case, the question is as to the obligation of the company to make the statements required by the statute. This distinction is without foundation. In the *Needles case*, the duty was expressly imposed upon the corporation to make statements identical in form and substance with those which insurance companies are required to make under the Ohio statute we are here considering. Many additional police powers were conferred by the Illinois law, among them being the authority which, as stated above, was given to the State Auditor to apply for an injunction restraining a company from continuing its business, whenever, by its statement, it appeared to him to be insolvent. It is, indeed, true that the relief there invoked was the restraint of the corporation from doing business on the ground of insolvency. But that case substantially involved not only the right to compel the statement, but the greater right to prevent, in case of insolvency, the continuance of the business of the corporation. Hence, as the greater includes the less, the *Needles case* necessarily embraces every issue presented here.

Another contention is that compliance with the provisions in regard to statements of its business would bring the company under the operation of the general law of the State relating to corporations, and thus place it in the position of voluntarily subjecting itself to many provisions which would, if applied, impair the obligations of the charter. In March, 1892, (89 Ohio Laws, 73,) the General Assembly of Ohio specifically enacted that any fire insurance company which should comply with the requirements of sections 3654 and 3655, or any other police regulations contained in Chapter XI of the title relating to corporations, and Chapter VIII, Title 3, Part 1, of the Revised Statutes of Ohio, relating to the insurance department of the State, "shall not be deemed to have consented to and shall not be affected by the provisions" of the title relating to corporations.

The judgment of the Supreme Court of Ohio in the case before us

expressly finds that, under the operation of this last provision, the plaintiff in error would not subject its charter to any conditions or modifications by making the statement which it now refuses to submit.

*Judgment affirmed.*¹

JOHNSON v. GOODYEAR MINING CO.

1899. 127 *California*, 4.²

APPEAL from a judgment of the Superior Court of Sierra County. Stanley A. Smith, Judge.

The facts are stated in the opinion.

Frank R. Wehe, for Appellants.

F. D. Soward, for Respondent.

COOPER, C. This action was brought about to recover from the corporation defendant for labor performed by plaintiff and for labor performed by others for defendant corporation, whose claims have been assigned to plaintiff. Judgment was entered in favor of plaintiff and defendants appeal. The case comes here on the judgment-roll. The findings show that the defendant corporation, while engaged in business in Sierra county, California, became indebted to plaintiff and some twenty others, who before the commencement of this action assigned their claims to plaintiff, for labor performed by the month at the instance of defendant corporation in its quartz mine in said county, and the same has not been paid. That four hundred dollars is a reasonable attorney's fee to be allowed to plaintiff for the prosecution of the action. As conclusions of law, the court found that plaintiff was entitled to judgment against defendant corporation for the sum of five thousand and thirty-nine dollars and fifty-seven cents and for four hundred dollars attorney's fees, and that the same is a first lien upon all the property described in the complaint, consisting of certain real estate, mining claims, and personal property, consisting of mining materials, tools, engines, cars, wood, lumber, merchandise for mining, etc., and that all the said property, or so much thereof as might be necessary, be sold to pay the plaintiff's judgment, costs, and attorney's fees. Judgment was accordingly entered. The action was brought to recover monthly wages and attorney's fees, and to have the amount declared a lien upon the property of the defendant corporation under an act approved March 29, 1897. (Stats. 1897, p. 231.) As the constitutionality of the act is the main question in controversy here, it will be necessary to give the

¹ As to the power of the legislature to regulate the business of insurance, see *Com. v. Vrooman*, A. D. 1894, 164 Pa. State, 306; *Orient Ins. Co. v. Daggs*, A. D. 1899, 172 U. S. 557; *John Hancock M. L. I. Co. v. Warren*, A. D. 1901, 181 U. S. 73; *Merchants' Life Ass'n v. Yoakum*, A. D. 1899, 98 Fed. Rep. 251. — ED.

² Portions of opinion omitted. — ED.

sections of the act herein discussed in full. The sections material are as follows:

"Section 1. Every corporation doing business in this state shall pay, at least once a month, each and every employee employed by such corporation, in transacting or carrying on its business, or in the performance of labor for it, the wages earned by such employee during the preceding month; provided, however, that if at the time of payment any employee shall be absent, or not engaged in his usual employment, he shall be entitled to said payment at any time thereafter upon demand.

"Sec. 2. A violation of any of the provisions of section 1 of this act shall entitle each of the said employees to a lien on all the property of said corporation for the amount of their wages, which lien shall take preference over all other liens, except duly recorded mortgages or deeds of trust; and in any action to recover the amount of such wages, or to enforce said lien, the plaintiff shall be entitled to a reasonable attorney's fee, to be fixed by the court, and which shall form part of the judgment in said action, and shall also be entitled to an attachment against said property. An unrecorded deed shall be no defence to such actions.

"Sec. 3. That on the trial of any action against such corporation for a violation of the provisions of this act, such corporation shall not be allowed to set up any defence for a failure to pay monthly any employee engaged in transacting or carrying on its business the wages earned by such employee during the preceding month, other than the fact that such wages were not earned, except a valid assignment of such wages, a setoff or counterclaim against the same, or the absence of such employee from his usual employment at the time of the payment of the wages so earned by him. . . .

"Sec. 5. No corporation shall require, and no employee of such corporation shall make, any agreement to accept wages at longer periods than as provided in this act as a condition of employment.

"Sec. 6. All wages earned by any employee engaged in the service of any corporation in this state shall be paid in lawful moneys of the United States, or in checks negotiable at face value on demand.

"Sec. 7. Any corporation violating any of the provisions of this act shall be subject to a fine not exceeding one hundred dollars, or less than fifty dollars, for each violation, the same to be imposed by any court in this state having jurisdiction of offences in which the penalty does not exceed a fine of one hundred dollars; said fine to be paid, by the judge or magistrate before whom a recovery may be had under the provisions of this act, into the general fund of the treasury of the county in which said conviction may be had."

The plaintiff claims the benefit of the provisions of said act applicable to this case, and the defendants contest the said provisions and every part of said act as being unconstitutional. The statute is said to contravene the following provisions of the constitution of the

state: 1. "No person shall be deprived of life, liberty, or property without due process of law" (Const., art. I, sec. 1, subd. 13); 2. "Nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens" (Const., art. I, sec. 1, subd. 21); 3. "All laws of a general nature shall have a uniform operation" (Const., art. I, sec. 1, subd. 11); 4. Section 25, article IV, providing that the legislature shall not pass local or special laws in the following cases: "3. Regulating the practice of courts of justice; . . . 24. Authorizing the creation, extension, or impairing of liens; . . . 33. In all other cases where a general law can be made applicable"; 5. Fourteenth amendment to the constitution of the United States: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws."

It will be observed that the act in question applies only to two classes of persons: 1. Corporations doing business in this state, and not to corporations of any other class; 2. To laborers performing labor for such corporations. It does not apply to the thousands of laborers who may be employed by individuals or copartnerships in the many and varied industries of the state. The word "corporation" in the act means those artificial persons created and existing under the laws of this or some other state; but the word "corporation," as to the rights of defendants, must be treated as though it means the name of all the individuals who are members of the corporation. It has long been settled that the word "person," within the meaning of the fourteenth amendment to the constitution of the United States, applies to a corporation. (*Douglas v. Pacific etc. S. S. Co.*, 4 Cal. 306; *Pasadena v. Stimson*, 91 Cal. 248; *Santa Clara County v. Southern Pac. R. R.*, 118 U. S. 394; *Pembina Min. Co. v. Pennsylvania*, 125 U. S. 181, 189; *Missouri Pac. Ry. v. Mackey*, 127 U. S. 205; *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 154.)

The rule is admirably stated in the *Railway Tax Cases*, 13 Fed. Rep. 743, as follows: "Private corporations are, it is true, artificial persons, but, with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some legitimate business. In this state, they are formed under general laws, and the Civil Code provides that they 'may be formed for any purpose for which individuals may lawfully associate themselves.' Any five or more persons may, by voluntary association, form themselves into a corporation. And, as a matter of fact, nearly all enterprises in this state requiring for their execution an expenditure of large capital are undertaken by corporations. It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion. On the contrary, we think it is well established by numer-

ous adjudications of the supreme courts of the several states that whenever a provision of the constitution or of a law guarantees to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents."

The case was afterward taken to the supreme court of the United States (Railway Tax Cases, 118 U. S. 396), and on the opening of court, before argument, the chief justice said: "The court does not wish to hear argument on the question whether the provision in the fourteenth amendment to the constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does." In discussing the provisions of the statute in question it will, therefore, be regarded as settled that the word "corporation" refers to the members who constitute the corporation, and that the rights of a corporation are to be measured by the same laws as the rights of a person. The law should be made for all alike, for the rich as well as the poor, for the corporation as well as the laborer. In Cooley on Constitutional Limitations, sixth edition, page 483, it is said: "But every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough. This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." In *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511, it is said: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law, the mass of the community and those who made the law by another, whereas the like general law affecting the whole community equally could not have been passed." Applying these principles to this act, it is clearly unconstitutional. It gives a first lien to laborers for the amount due them from corporations doing business in this state upon all the real and personal property of such corporations, and does not even require any description of the property or notice in any manner in order to make such lien valid. It seems to give the laborer the right to an attachment against the property of the corporation without requiring him to make the affidavit

and file the undertaking required of all other persons in order to procure such attachment. It does not give this lien to any other class of laborers. The thousands of laborers for individuals or copartnerships in the like employment do not have the benefit of it. The laborer toiling at the same kind of labor, felling the forest, tilling the soil, or digging in the bowels of the earth, has no such lien if he is not working for a corporation doing business in this state. The lien attaches to the property of such corporation, but not to the property of an individual under precisely the same circumstances. Under general law, liens are given to all mechanics, artisans, laborers, or materialmen, and against all persons or corporations. Under the present statute, a lien is given to laborers performing labor for the particular corporations named. All other persons in the state, after obtaining an ordinary money judgment, must enforce it by the writ of execution, but laborers for such corporations under this statute have the right to have the court declare the amount found due them a lien on all the property of the corporation, which shall take preference over all other liens except recorded mortgages and deeds of trust. The grocer who, perhaps, has furnished the corporation the food with which the laborer has fed his wife and children may have attached the property of the corporation for the purpose of securing himself, but the laborer's lien by the mighty hand of the statute at once sweeps it away. The materialman or contractor who has furnished the material for or constructed a building for the corporation, and who has filed his notice of lien as provided in the Code of Civil Procedure, and who may have secured a judgment thereon, must stand by and see his lien destroyed by a decree of court in favor of laborers who performed labor for the corporation since his lien attached. The judgment creditor who has procured a judgment and had it regularly docketed, and who is resting securely under the provisions of the Code of Civil Procedure of this state making his judgment a lien upon all the real estate of the judgment debtor, is surprised to find his lien destroyed by a decree in favor of one who has performed labor for the corporation long since his lien attached. The corporation may have delivered a large amount of personal property by way of pledge to secure a loan, and the money may have been used in paying the laborers employed by the corporation, and yet, under this statute, the court must declare the amount due laborers a prior lien as against the pledgee who has actual possession of the property pledged. The statute gives the laborer a right, in case he recovers judgment, to recover attorneys' fees, which become a part of the judgment. No other class of laborers or persons are given the right to recover attorneys' fees except by virtue of a contract or by virtue of a general statute. The corporation is prohibited from setting up any defence to the action except some two or three. Matters which might be pleaded as a defence by all other persons in the state are not allowed to be so pleaded by the corporation. If the legislature could deprive the corporation of some of the defences which other litigants on like terms are allowed

it could, by a Draconian edict, deprive it of all of them and say at once that the corporation should make no defence whatever to the action. The corporation and the laborer are prohibited from making any contract whereby wages are to become due for a longer period than one month as a condition of employment, or by which the laborer is to be paid in anything except money or negotiable checks. The working man of intelligence is treated as an imbecile. Being over twenty-one years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due. Being of sound mind and knowing the value of a horse, he is not allowed to make an agreement with the corporation that he will work sixty days and take the horse in payment. Business might be such that a corporation could not possibly pay wages without getting laborers who were willing to wait for their wages until the corporation could get money with which to pay them by marketing its products. The laborer might be interested in the corporation, or for some reason willing to wait until the corporation could pay him. Yet the parties, being able to contract and willing to contract, and desiring for the good of each other to contract, are by this statute forbidden to do so. Not only this, but the corporation shall be subject to a fine of not less than fifty dollars for each violation of the statute. A corporation employing a thousand men and sued by each could not defend the suits without being limited in its defences to those named in the statute, and being subject to a reasonable attorney's fee in each case. In case it made a contract with the thousand men by which they agreed to work for it three months for one hundred dollars each they could bring suit and recover before the end of the three months and each recover an attorney's fee, making a thousand attorney's fees, and the corporation would be subject to one thousand fines of one hundred dollars each, making the modest sum of one hundred thousand dollars in fines, or perhaps the magistrate might in his discretion make the fine fifty dollars in each case and thus reduce it to fifty thousand dollars. We might enumerate many other infirmities in the statute, but the above are sufficient to destroy it. It is probably unnecessary in this opinion to discuss separately the constitutional objections herein briefly pointed out.

[The learned Judge here cited and commented upon various authorities.]

It is claimed that corporations are a class and that classifications can be made, and that a law is not unconstitutional if it affects all of a class. While this is true, yet the classification must be founded upon differences either defined by the constitution or natural, or which will suggest a reason which might naturally be held to justify the diversity of legislation. (*Darcy v. Mayor etc.*, 104 Cal. 645; *State v. Hammer*, 42 N. J. L. 439; Cooley on Constitutional Limitations, 6th ed., 484.) Arbitrary selection can never be justified by calling it classification. (*Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 159.) In this case there can be no reason why a corporation doing business in this state should have its

property subjected to a lien, unless the property of other persons in the state under like circumstances is subject to the same kind of a lien, or why such corporations should be prohibited from making defences which all other persons in the state may make, or why such corporations should pay attorneys' fees or fines in an ordinary action at law while all other persons under like circumstances are exempt from such attorneys' fees and fines, or why such corporation cannot create valid liens upon its property other than by a deed or mortgage duly recorded while all other persons in the state may do so, or why such corporations shall be denied the privilege of making a contract as to the manner of payment of its employees while all other persons in the state who are over twenty-one years of age and not incompetent may do so, or why laborers cannot make a valid contract as to the time when their wages shall become due, or the kind of property or money in which they shall be paid. It is said that corporations being the creatures of the state, and deriving their powers from their charters, the same power that created them may alter or amend their charters or deprive them of rights originally given them. This is true as to certain purposes, but the legislature cannot, after creating a corporation and while it exists, deprive it of the rights guaranteed to it by the federal constitution, nor deprive it of its right to resort to the courts of law, nor take its property without due process of law, nor subject it to unequal and oppressive burdens, nor deprive it of the equal protection of the laws. (*Maine etc. R. R. Co. v. Maine*, 96 U. S. 499; *Sinking Fund Cases*, 96 U. S. 700; *Railroad Tax Cases*, 13 Fed. Rep. 754, 755; *Detroit v. Detroit etc. Plank Road Co.*, 43 Mich. 140-147.)

That portion of the judgment in favor of plaintiff and against the defendant corporation for five thousand and thirty-nine dollars and fifty-seven cents, with costs, should be affirmed. The portion awarding the plaintiff four hundred dollars attorneys' fees, and declaring that the plaintiff is entitled to a lien upon the property of defendant corporation and to have a commissioner appointed to sell the property, should be reversed.

HAYNES, C., and CHIPMAN, C., concurred.

For the reasons given in the foregoing opinion that portion of the judgment in favor of plaintiff and against the defendant corporation for five thousand and thirty-nine dollars and fifty-seven cents, with costs, is affirmed. The portion awarding the plaintiff four hundred dollars attorneys' fees, and declaring that the plaintiff is entitled to a lien upon the property of defendant corporation and to have a commissioner appointed to sell the property, is reversed.

HARRISON, J., GAROUTTE, J., VAN DYKE, J.

Hearing in Bank denied.¹

¹ The statute here held unconstitutional was declared valid in *Skinner v. Garnett Gold Mining Co.*, A. D. 1899, 96 Federal Reporter, 735 (commented upon in one of the omitted

NEIL, J., IN STATE v. LEBANON & W. TURNPIKE CO.

1900. *Court of Chancery Appeals of Tennessee*. 61 *Southwestern Reporter*, 1096, p. 1097.

NEIL, J.

It is next insisted that the provisions of the act of 1849-50 are valid as an exercise of the police power. The defendant, on the other hand, insists that this act is void because it impairs the obligation of the contract entered into by the state and the defendant in the charter and the amendments, and by the acceptance of the acts by the defendant. At this late day there is no need of the citation of authority to support the proposition that a charter is a contract, and that its binding force cannot be impaired by subsequent legislation not assented to by the corporation. It is true, however, that under the police power the legislature may enact regulations for the exercise of the franchises of the company, looking to the protection of the public health, safety, and convenience. The state, however, cannot, under the guise of regulating a corporation, take its franchises from it; nor can it, by way of regulation of the exercise of the franchises of the corporation, compel it to donate to the county or the state a sum of money, or to undertake public improvements beyond its line. These principles, we think, cannot be controverted. Now, to apply them to the present case, the act of 1849-50 required of the defendant, as a condition of the exercise of its franchises, that it should build beyond the end of its road a bridge across Stone's river. This requirement, we think, if enforced, would be but a form of confiscation of the property of defendant. It results that the decree of the chancellor must be affirmed, with the costs of this court and of the court below.

portions of the opinion in *Johnson v. Goodyear Mining Co.*). While some of the views expressed in the *Skinner* case are irreconcilable with the opinion in the *Johnson* case, it should be noted that one of the grounds relied on by the court in the *Skinner* case is the provision in the Constitution of California, providing that: "All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

It should also be noted that, in some other cases where general expressions are used seemingly at entire variance with the reasoning in the *Johnson* case, yet the decision is really based, in whole or in part, upon the existence of a reserved legislative power to amend the charter. For instance, in *Leep v. St. Louis &c. R. Co.*, A. D. 1894, 58 Arkansas, 407, a majority of the court held, that a statute regulating the payment of wages, although it would be invalid as to individual employers, was valid as applied to corporate employers; the *ratio decidendi* being the existence of a reserved legislative power to alter or repeal the laws under which corporations are formed. BATTLE, J., said (pp. 427, 428): "But what is true of persons is not always true of corporations. Natural persons do not derive the right to contract from the legislature. Corporations do. They possess only those powers or properties which the charters of their creation confer upon them, expressly or as incidental to their existence; and these may be modified or diminished by amendment or extinguished by the repeal of the charters."—Ed.

SECTION III.

Reserved Power in Legislature to repeal Charter.

READ v. FRANKFORT BANK.

1843. 23 *Maine*, 318.

ASSUMPSIT against the defendants as indorsers of two promissory notes. The plaintiffs introduced the proof necessary to charge the defendants as indorsers.

The defendants thereupon contended that the action could not be maintained by reason of the provisions of the additional act of April 16, 1841, repealing the charter of the Frankfort Bank, which required all claims to be presented and proved before the receivers, appointed to take charge of the effects of the bank, prior to July 1, 1842, as it had not been shown, that the plaintiffs had complied with such provision. The plaintiffs then proved, that the action was commenced Feb. 2, 1841, and that property was attached on the same day. And that on June 17, 1841, a copy of the writ was duly served upon the receivers.

SHEPLEY J. who presided at the trial, ruled that the service of the writ upon the receivers was not such presentation of the claim and proof, as the statute required, and that the action could not be maintained. The plaintiffs filed exceptions.

Hathaway and *Hubbard*, for the plaintiffs, contended that as the action was commenced before the repeal of the charter, and the debt secured by an attachment of property, their right became vested, and that the legislature had no constitutional power to pass acts affecting their rights injuriously. *Metc. & P. Dig.* 555 ; 8 *Mass. R.* 43 ; 2 *Gallis.* 141 ; 2 *Greenl.* 294 ; 3 *Greenl.* 326 ; *Story's Com. on Const.* c. 34.

They also contended, that the service of the writ upon the receivers was in substance a compliance with the requirements of the statute in relation to proof of the claim.

W. Kelley and *Merrill*, in the defence, said that the legislature reserved in the charter the right to repeal it, on the happening of a certain event, which it is admitted has taken place in this case. This is clearly a constitutional act. When the corporation ceased to exist, the action was gone. This is decisive against the present case. The legislature, however, did provide a remedy by taking possession of the effects of the corporation, and making an equal distribution thereof among all the creditors, who would bring in and prove their debts. The plaintiffs

have less ground for setting up a claim to vested rights, than the creditor who has attached the property of an insolvent man, who dies during the pendency of the suit.

Merely giving the receivers notice of the suit, cannot be considered as presenting and proving the claim.

The opinion of the Court was prepared by

TENNEY J. — By the statute of March 29, 1841, c. 139, the act incorporating the Frankfort Bank was repealed, and provision made for the appointment of receivers, who were required, when qualified to act, to demand and receive of the officers of the Bank the property to the same belonging. On the 16th of April, 1841, an additional act was passed requiring all creditors, in order to entitle themselves to a distributive share of the assets, and to prevent their claims from being barred, to exhibit and prove them to the receivers on or before the first day of July, 1842.

This action was commenced and an attachment of property made previous to the repeal of the charter of the Bank; and it is insisted that thereby a right became vested in the plaintiffs to proceed with the suit under the laws, which were in force at the time of its commencement, and that the same cannot constitutionally be affected injuriously by any act of the legislature. But if the repeal was not in contravention of the constitution, it is contended that the plaintiffs have substantially complied with the statute of the 16th of April by causing a copy of the writ to be served on the receivers on the 17th of June, 1841, a time long before that, when the claim was to have been barred, if the same had not been exhibited and proved to the receivers.

By the act of 1831, c. 519, entitled "an act to regulate Banks and Banking," § 32, the legislature reserved to themselves, in cases therein named, after certain proceedings, the right to declare charters of Banks forfeit and void. The Frankfort Bank, incorporated after the enactment of this statute, was subject to its provisions, which were a part of its charter. It is not contended that the Bank had not exposed itself, so that its charter was properly revoked, or that all the necessary steps were not taken by the legislature agreeably to the general statute of 1831, previous to the repealing act; and in default of evidence to the contrary, it must be so presumed. Neither is it contended, that the Bank did not submit to the provisions of the repealing statute, acknowledged the authority of the receivers, and surrendered to them its books and its property.

After this, the creditors of the Bank cannot object to the constitutionality of the Act, dissolving the corporation, when it was done for causes, which by the charter were sufficient for the purpose, and when the repeal was conclusive upon the Bank. Indeed, it is not seen how *any* objection can be made by those, who had no other connexion therewith, than that of being its creditors. Whoever entered into contracts with it, exposed himself to losses which might arise from its dissolution, as he would with natural persons, by their death. No security

was provided in the charter, or other statute, against such an exposure to injury.

The Bank having ceased to exist, excepting so far that the receivers could prosecute any suit pending in its name; and could use the name of the Bank in any suit, which might be necessary to enable them to collect any of the debts due to the Bank, there is no party whom the plaintiff can prosecute or take judgment or execution against, unless it be in a court of equity. The Bank as such have no longer the power to sue or to be sued; the receivers alone are the successors of the corporation, and they take all the property for the purposes specified in the act of repeal, and for those purposes only. Their appointment and the power given to them in no wise infringe the previously existing rights of the plaintiffs. It is by and through them, that the property is to be made available in the payment of the debts against the Bank. If the receivers had not been appointed, the plaintiffs could have no better prosecuted their suit, than they are now able to do. The repeal of the charter has presented the obstacle to their further proceedings, by dissolving the party against whom they had commenced them.

The obligation of the contract between the plaintiffs and the Bank was not impaired by the repeal of its charter, but the mode of obtaining indemnity for its violation was changed. The bank was created by the legislature, and by the charter, there was no provision made for the prosecution of suits against it, if that charter should be declared by the same power forfeit and void; but a mode has been provided in the repealing act, by which creditors are enabled to obtain satisfaction for their claims, to the extent of the means existing therefor. A remedy for a party may be changed or wholly taken away by the legislature without contravening the constitution of the United States. *Thayer v. Seavey*, 2 Fairf. 284; *Oriental Bank v. Freese*, 18 Maine R. 109. And such a change may constitutionally affect suits pending at the time, when it is made.

Have the plaintiffs saved themselves from the operation of the limitation contained in the act of April 16, 1841? We are satisfied, that they have not; though we do not perceive how a decision of that question can influence this case. For if we have taken the correct view of the effect of the act of repeal, this action can be no farther prosecuted, in any court. The claim of the plaintiffs in this case is upon two notes of hand indorsed by the Bank. The writ was the legal process to obtain a judgment upon this claim. In order to bring the affairs of the Bank to a close within the time prescribed, the receivers were to be made satisfied of the existence of the demands and the legal title of the claimants to payment. The writ could not tend in the least to do either, and the service of the same by a copy, was not such an act as to take the case from the effect of the limitation.

Nonsuit confirmed.

ERIE AND NORTH-EAST R. CO. v. CASEY.

1856. 26 Pa. State, 287.¹

BILL in equity, filed by the Erie and North-East R. Co. to restrain the defendant from taking possession of the railroad of plaintiff company.

The charter of the R. R. Co., granted in 1842, contained a provision, that "if the said company misuse, or abuse any of the privileges hereby granted, the legislature may resume the rights and privileges hereby granted to the said company."

In 1855, the legislature passed an act, repealing and annulling the charter of the company, and authorizing the Governor to appoint one or more persons to take and have the charge and custody of the said railroad. The defendant Casey was appointed by the Governor under this act, and was about to take possession of the road.

The plaintiffs thereupon filed the present bill; which prayed for a special injunction and for further relief.

On Jan. 9, 1856, the rule for a special injunction was heard on the bill, and special affidavits and exhibits, before the court in banc.

St. G. T. Campbell and *Meredith* (*Stanton* and *Hurst* with them), for plaintiffs.

Casey and *Thompson*, for respondent.

BLACK, J. [After overruling other objections to the validity of the repealing act.]

The authority given by the Act of October, 1855, to the defendant to take possession of the railroad is asserted by the plaintiff's counsel to be an act of confiscation — a taking of private property for public use without compensation. If this be true, the injunction ought to be awarded; for no legislature can do such a thing under our constitution. When a corporation is dissolved by a repeal of its charter, the legislature may appoint, or authorize the governor to appoint a person to take charge of its assets for the use of the creditors and stockholders; and this is not confiscation, any more than it is confiscation to appoint an administrator to a dead man, or a committee for a lunatic. But money, or goods, or lands, which are or were the private property of a defunct corporation, cannot be arbitrarily seized for the use of the state without compensation paid or provided for. This act, however, takes nothing but the road. Is that private property? Certainly not! It is a public highway, solemnly devoted by law to the public use. When the lands were taken to build it on they were taken for public use; otherwise they could not have been taken at all. It is true the plaintiffs had a right to take tolls from all who travelled or carried freight on it, according to certain rates fixed in the charter, but that was a mere franchise; a privilege derived entirely from the charter,

¹ Statement abridged. Arguments and portions of opinions omitted. — Ed.

and it was gone when the charter was repealed. The state may grant to a corporation, or to an individual, the franchise of taking tolls on any highway, opened or to be opened, whether it be a railroad or river, canal or bridge, turnpike or common road. When the franchise ceases by its own limitation, by forfeiture or by repeal, the highway is thrown back on the hands of the state, and it becomes her duty, as the sovereign guardian of the public rights and interests, to take care of it. She may renew the franchise, give it to some other person, exercise it herself, or declare the highway open and free to all the people. If the railway itself was the private property of the stockholders, then it remains theirs and they may use it without a charter as other people use their own — run it on their own account — charge what tolls they please — close it or open it when they think proper — disregard every interest except their own. The repeal of charters on such terms would be courted by every railroad company in the state; for it would have no effect but to emancipate them from the control of law, and convert their limited privileges into a broad, unbounded license. On this principle, a corporation might be rewarded, but never punished, for misconduct. Repeal of its charter, instead of bringing it to a shameful end, would put “length of days in its right hand, and in its left hand riches and honour.” But it is not so. Railroads made by the authority of the Commonwealth upon land taken under her right of eminent domain, and established by her laws as thoroughfares for the commerce that passes through her borders, are her highways. No corporation has any property in them, though corporations may have franchises annexed to and exercisable within them.

Such a franchise the plaintiffs had, but they have it no longer. The right to take tolls on a road is an incorporeal hereditament, which may be granted to a corporation or to an individual, and the grantee has an estate in the franchise. But what estate? The estate endures for ever if the charter be perpetual; for years, if it be given for a limited period; and at will, if it be repealable at the pleasure of the legislature. This corporation, after its privileges were abused, had an estate at will, and the Commonwealth chose to demand repossession. That terminated the estate as completely as an estate for years would be terminated after the expiration of the term. The grant was exhausted, the corporation lived its time out. Its lease of life was expressly limited, at the day of its creation, to the period when the legislature should dissolve it for misconduct. When the legislative will was spoken, its hour had come. Having no right to keep the franchises any longer, it would be absurd to claim compensation for taking them away. To say that the stockholders have a right to compensation for the franchises, because they are wrongfully taken, and that they were wrongfully taken because they have a right to compensation, would be reasoning in a very vicious circle. If the stockholders had a right to retain the franchises, the charter could not be repealed at all, with or without compensation. If they had no right to retain them, they have no claim to compensation.

A brief recapitulation of the main points in the case may serve to make the grounds of our judgment somewhat plainer.

I. This charter was granted with a reservation of the right to repeal it, if the franchises should be abused or misused.

II. We are satisfied that, in point of fact, those franchises were abused and misused.

III. After that event happened, the General Assembly was invested with full power to repeal the charter, and the corporators held their franchises from the state merely as tenants at will, in the same manner as if there had been an unconditional reservation of the right to repeal.

IV. After the interest of the corporators had been thus cut down by their own misconduct to an estate at will, the legislature only could enlarge the charter, so as to make it a perpetual grant, or put the corporators on another term of probation.

V. The judicial proceedings against the corporation did not and could not disarm the legislature of its reserved right to repeal, nor enlarge the estate of the corporation in its franchises, nor change the terms of the original grant, for these are things which the judiciary cannot do, nor the executive either.

VI. The power of the legislature is not restricted by the rules of pleading and evidence which the courts have adopted; and therefore the state may act in the legislature upon a truth which she would have been estopped to show in a court if the legislature had not interfered.

VII. The power to repeal for abuse of corporate privileges is a different right from that of demanding a judicial sentence of forfeiture, and is reserved for the very reason that it may afford a remedy when a *quo warranto* would not.

VIII. The charter being constitutionally repealed, the franchises are, as a necessary consequence, resumed to the state, and the road remains what it always was — public property.

IX. The corporators cannot be entitled to compensation, for they had no property in the road, and after their default they held the corporate franchises, at the will of the legislature, and the exertion of that will, in the resumption of the franchises, did them no injury but what they agreed to submit to.

The injunction which the plaintiffs have moved for is to be refused.

LOWRIE J. and KNOX J. delivered concurring opinions.

LEWIS C. J. and WOODWARD J. delivered dissenting opinions [which are reported in 1 Grant's Pennsylvania Cases, 274-301]. From these opinions, the following extracts are made.

LEWIS C. J. But the Act of 1855 bears upon its face decisive evidence, that other objects were in contemplation than the mere nullification of the charter. It provides for taking possession of the railroad,

keeping it in good running order for the accommodation of the public travel and business, collecting the revenues and disposing of them as the legislature may hereafter declare, subject to any rights or obligations which may exist. It also provides for restoring the possession of the road to the company, if they shall break up the connection at present existing with the western road — extend their road to the harbor of Erie and terminate it at that point, and change the gauge throughout the whole length of it, either to four feet eight and a half inches, or six feet, and maintain the same thereat. These are burthens which the charter did not authorize the legislature to impose. That the termination at the harbor would greatly increase the expenditures of the corporators, and materially impair the usefulness of the road for the purpose for which it was designed is perfectly manifest. That this is the principal object of the act is too evident to escape observation; and that it is imposing a ruinous burthen, not warranted by a single word in the charter, is equally clear.

If the corporation refuses to comply with the conditions proposed by the Act, what is to become of the railroad? It must be remembered that the State is acting under a *reservation*, not a *grant* of power. It is the very essence of a reservation that it can operate only upon the powers existing before in the party making it. It has no effect whatever upon rights which previously existed in the opposite party, or were afterwards acquired by his labor and money expended on the faith of the grant. The powers existing in the State before the charter were merely the privileges granted by it. These were all that she granted, and these only can she take away under a reservation. The language of the reservation plainly confines its operation to these only. The State granted neither land, nor money, nor goods, and she can take none of these from the stockholders. The reserved power to annul the charter carries with it therefore no power whatever to seize the railroad, or to divest the stockholders or the owners of the land, of their rights and property. At common law, upon the civil death of a corporation, all its real estate remaining unsold reverts to the grantor and his heirs; for the reversion in such case is a condition annexed by law, inasmuch as the cause of the grant has failed. 1 Bl. Com. 484; 2 Kent's Com. 307; Angell & Ames on Corporations, 159, 750; Co. Lit. 13, b; 15 Howard's Rep. 310.¹ It might be that a Court of Chancery, in a proper case, would appropriate it to the debts of the corporation. But this is not the question here. It has been held that where a title to land is vested in a turnpike company for the purpose of a road, and the road is abandoned, the land reverts to the original owner; 12 Wend. 371. And writers of approved authority inform us that the grant to a corporation is indeed only during the life of the corporation, and that when its life is determined by the dissolution of the body politic, the grantor takes it back by reversion, *as in case of any other grant for life*. 1 Bl. Com. 484; Angell & Ames, 159.² If the charter

¹ But see *Bacon v. Robertson*, ante, p. 618. — ED.

² But see *Nicoll v. N. Y. & Erie R. R.*, ante, p. 181. — ED.

in question is legally declared null and void, the railroad reverts to the former owners of the land on which it is constructed. The title by reversion is as sacred as a title in possession or remainder, and the owners cannot be deprived of it except by due course of law. So that the only effect of this act of abrogation will be to destroy the railroad altogether, or to throw it into the hands of the individual landholders along the route, without any security that it will be kept in running order for the public accommodation. Under the power to take lands for ordinary roads, the legislature might take the land on giving compensation for the improvements. But in this case no provision for compensation has been made, and that already received was only for the easement during the life of the corporation. So that by no rule of law, nor any fair construction of the clause of reservation, can the State take possession of the railroad in the manner and for the purposes proposed by the act, even if her right to annul the charter were fully conceded. It is idle to call the railroad a *common* highway, in order to justify this extraordinary act of confiscation. The State has not made it so, nor can she make it so, unless she takes the land for the purpose upon just compensation to the owners. It is of the utmost importance that the law on this branch of the case should be insisted on. If a State, under a reservation of power to revoke a charter may also seize and confiscate all the acquisitions of the stockholders, a constant temptation will be presented to exercise the power without cause. A judgment should be impartially pronounced. But if the State, or local authorities of great influence, are to gain by confiscating the assets of a wealthy corporation, who can hope for an impartial decision, or what corporation in the Commonwealth is safe?

WOODWARD J. I am obliged to say, further, that I consider this Act of Assembly in direct conflict with that clause of the 10th section of the 9th article of the Constitution of Pennsylvania, which is in these words: “*Nor shall any man’s property be taken and applied to public use without the consent of his representatives, and without just compensation being made.*”

The stockholders of the Erie and North East Railroad Company are *men* within this clause — the franchise they hold, (which is the right to maintain and enjoy their railroad,) and the interest they have in the ground occupied by it, and in the material substances of which it is composed, are *property*: and that it is to be taken and applied to public use under the Act of 1855, is proved by the 2d section, which authorizes the governor to appoint a suitable person to take charge and custody of the road, “*until the same shall be further disposed of according to law* ;” and by the declaration of the defendant, that he will, as the appointee of the governor, take possession of the road, unless restrained by the injunction of this court. If it be assumed that the law was passed with the consent of the representatives of these *men*, the only remaining question is, does it provide a “just compensation?”

There is not a word or syllable in the act looking to compensation. The 5th section authorizes the governor to restore it to the company on certain conditions to be performed by them, which, instead of being compensation, are burthens laid upon the company as the price or consideration of a renewed existence. How then can I, who am sworn to support the Constitution, support a law which is in such direct and palpable conflict with it? The Constitution says, that property shall not be taken without compensation — this law says it shall.

Let us examine the argument set up in favor of the law on this point.

Again the resort is to the repealing clause, and that is made to bear the burthen of this palpable infraction of the Constitution. Does it say that the franchise may be resumed without compensation? Not a word of it. Does the Constitution say that property shall not be taken for public use, except in the instance of a corporation, with a clause of resumption in its charter? Not a word of it. And yet judicial construction can so bend both the law and the Constitution, as to make them meet.

That the State, in virtue of her eminent domain, can take all kinds of property when public exigencies require it, is a doctrine I hold most distinctly. Every man holds everything which can be included in that most comprehensive word, “property,” by no higher tenure than the will of the sovereign; but “just compensation” is the correlative duty of the sovereign. A franchise, like any other hereditament, incorporeal or corporeal, may be taken on this single condition, but nothing that is property can be taken in violation of it. Whether a mere franchise, where nothing has been done or invested on the faith of it, is property within the meaning of the Constitution, is a question which need not now be considered, for it is not presented in the case that is before us. This is the case of a private corporation, with large investments actually made. Here the franchise, or the “rights and privileges,” in legislative language, have been accepted, — property, real and personal, accumulated on the faith of them, — a railroad built in a most important line of trade and travel, and furnished with all appliances for the accommodation of the public, and a distinction can no longer be made between the franchise and the material, and tangible property with which it is identified. The legislature attempted no distinction, for in resuming the franchise, they provided also for taking the visible property, and I agree that they were so indissolubly united, that to take one was to take both.

But to take both, without a word or thought of compensation, was justified by nothing that is set down in the contract, and was forbidden by as plain words in the Constitution as the English language could place there.

Upon the dissolution of a corporation by *judicial* sentence, its real estate reverts to the grantors or their heirs, and its personal property goes to the State, as the successor to this prerogative of the crown, but

no such incidents attend a *legislative* forfeiture. That must be, in all its parts, according to the contract which gives the legislature the power, and when the contract does not stipulate that property held on the faith of it may be taken without compensation, it cannot be so taken if the Constitution means what it says. If, therefore, there had been no waiver in this instance, and if the legislature had established misuse and abuse, and, in virtue of the reserved power, had resumed the rights and privileges granted, they were bound to provide a just compensation for the property taken. Confiscation of that was not in the contract, and, therefore, not within the legislative power.

Hitherto, property, in all its forms, has been regarded as one of the "general, great, and essential principles of liberty" in Pennsylvania. When the government has required more of the citizen than his share of general burthens imposed through the taxing power, he has been compensated for what has been taken. And looking to the immense investments already made on the faith of our constitutional guaranties, and yet to be made before the high destinies of the State are fully reached, it is obvious that our settled policy is not more agreeable to our fundamental law than it is to the honor and interests of the State. This act of assembly is a wide departure from our established policy and practice — evidently passed in ignorance or forgetfulness of the salutary injunction of Chancellor Kent, that "*these legislative reservations of a right of repeal ought to be under the guidance of extreme moderation and discretion.*" 2 Com. 307. The best wish that such an act is capable of exciting is, that as it has no precedent, it may never itself become one.

There is an observation in the printed argument of the counsel for the plaintiffs, which, on reflection, has made a sensible impression on my mind. It is, that the Act of 1855 is not a *bona fide* exercise of the reserved right of repeal. If this be a fair comment, it answers the whole argument in support of the law, for that rests on the reservation and nothing else. Taking the ten sections of the repealing law together, there is ground to doubt whether the legislature did not use this reservation as the means of forcing new and onerous burthens upon the company — whether they did not mean, that, instead of dying and being buried, it should survive and perform the arduous and expensive work of building a road to the harbor, and of changing their gauge throughout.

I do not intend to discuss this view of the act, but allude to it for the purpose of saying, that it would be, if so understood, no less a violation of the contract than in the other views that have been presented.

Subsequently the plaintiffs, by leave, amended their bill. An answer was filed; and testimony was taken. The cause came on for final hearing before the court in banc, June 7, 1856, on the bill, answer, plea, and proofs returned by the examiners.

Stanton and *Meredith*, for plaintiffs.

Thompson and *Franklin*, for respondent.

BLACK, J. [After overruling other objections to the constitutionality of the repealing act.]

It is further objected to this law, that it is an act of confiscation — takes private property for the public use of the state without compensation. The government of the United States is forbidden to do this by the federal constitution. That instrument of course has nothing to do with this part of the case. But the state constitution also declares that “no man’s property shall be taken or applied to public use without the consent of his representatives, and without compensation being made.” Does this act violate the state constitution in that part of it? We answered this in the negative when we refused the special injunction, and gave reasons which need not now to be repeated. Railroads built under the authority of law for the general purposes of commerce, are public highways. On this principle alone we decided that municipal subscriptions were valid. On this principle alone can land and materials be seized to make them. On this principle alone can the laws be justified which limit the tolls upon them. On this principle alone have we the power, so often exercised, of compelling those who have charge of them to keep within the boundaries of the law. On this principle alone we have always held that no individual or corporation can possibly have any right or privilege connected with them except what the law has expressly conferred. The charter of this company contained a series of regulations presenting the manner in which a public highway should be used; the repeal abolished those regulations and substituted a different set. By the charter, and by the charter alone, were the plaintiffs authorized to interfere with it at all; the repeal necessarily took that authority away. A public highway is not private property any more than a public office is private property. The execution of the law relating to an office is intrusted to an individual; a corporation as well as an individual may be intrusted with the execution of the law which relates to a highway. In either case, if the trust be abused it may be withdrawn; but neither the highway nor the office is thereby extinguished. The people still have a right to be served in both, and it is the duty of the state to see that they are. The removed officer has no right to keep the records, and the removed company has no right to keep the road. If this law be unconstitutional because it takes the road from the company, then it follows that no charter of a railroad, canal, or turnpike company can ever be repealed however clear the right, nor forfeited however gross the abuse, without leaving the highway in the possession of the corporators as their private property, and giving them, as private owners, a control over it infinitely greater and more dangerous than they had before.

The suggestion that the repealing act will have the effect of putting the road into the possession of the persons whose lands were taken to build it on, is entitled to still less regard. In the first place, it is founded in manifest error. The lands were taken and devoted to public use as a highway for ever, unless the state should see proper to vacate and abandon the road. It has not been vacated or abandoned.

It is to be used by the public as heretofore. The public will has been expressed that it shall be hereafter used in a different way, and the public rights upon it be guarded by different agents. If this be a vacation of the road, then the Columbia Railroad would be vacated by a change in the board of canal commissioners. Again, the landholders are not complaining of this law, nor have they authorized the company to complain for them. It is nothing to them whether the state chooses to let the cars run over the road under the command of one agent or another. But even if the landowners were here and could prove that the land has reverted to them by the operation of the repealing act, I presume nobody thinks it would be unconstitutional for that reason.

Another and most important point has been raised in the case on the final argument. Since this bill was brought, and since the motion for a special injunction, to wit, on the 22d of April, 1856, the legislature passed a new act of incorporation for the plaintiffs, giving them new privileges, and imposing upon them new duties and restrictions. This act was accepted by the stockholders, and under it the road has been redelivered to the company. Why then do they insist on a judicial recognition of their franchises under the repealed charter? This might be hard to answer, unless it be that they think the old charter more advantageous than the new one. They probably intend, if they can, to repudiate the contract they made with the state in 1856, and fall back upon that of 1842. But could they do this even if the intermediate repealing act were void? Most certainly not. The charter of 1842 is repealed by the Act of 1856 if it was never repealed before. They will not say that the last-mentioned repeal is void, for they gave it their full assent. These plaintiffs then are before us demanding a restitution of what they call their rights under a contract which they themselves have solemnly agreed to rescind, and in whose place they have substituted a new contract, of which they are at this moment enjoying the benefits and advantages. We are thoroughly satisfied that if there were no other objections to the plaintiffs' case, we would be obliged to dismiss the bill for the sole reason that the law under which they claim has been repealed with their own consent.

The only specific relief prayed for in the bill, as originally filed, was an injunction against the defendant to restrain him from taking possession of the road and collecting the tolls. Under the Act of 1856 they have got already what is better than an injunction — the actual enjoyment of all they ask — the full possession of the road. They need no injunction, and can have none, to protect a right which nobody intends to take away. But they have amended the bill so as to pray for an account. There is no averment nor no evidence of any fact which shows that they ought to have an account. We are convinced that the defendant has no money in his hands to which the plaintiffs even pretend a claim. When this point was discussed at the bar, nobody asserted that the plaintiffs had any just demand upon the defendant for money.

The prayer of the plaintiffs to be protected in the possession of the

railroad and its revenues under the charter of 1842, must be refused. — 1st, Because that charter was constitutionally repealed in 1855, for abuse and misuse; 2d, Because it was also repealed in 1856, with their own consent; and 3d, Because they have the railroad in their possession under another charter which they have accepted. Their prayer for an account is refused, because they show us no ground nor reason for believing that there is any account between them and the defendant.

It is ordered, adjudged, and decreed, that the plaintiffs' bill of complaint in this cause be dismissed, and that the defendant do recover from the plaintiffs the costs by him in this behalf expended.

LEWIS, C. J., dissented, and WOODWARD, J., was absent on the final argument.

GREENWOOD v. UNION FREIGHT R. CO.

1881. 105 U. S. 13.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

The case was argued by *Mr. George F. Edmunds*, with whom was *Mr. Alonzo B. Wentworth*, for the appellant, and by *Mr. Darwin E. Ware* and *Mr. William G. Russell* for the appellees.

MR. JUSTICE MILLER delivered the opinion of the court.

The appellant, Greenwood, a citizen of the State of New York, brought his bill of complaint against the Union Freight Railroad Company, a corporation established by the laws of Massachusetts; against the Marginal Freight Railroad Company, likewise a Massachusetts corporation; against the city of Boston, its mayor and aldermen by name; and against the directors of the Marginal Freight Railroad Company, — all citizens of Massachusetts.

The Union Freight Railroad Company demurred to the bill, and the demurrer was sustained and the bill dismissed. It is this decree which we are called on to review on appeal taken by complainant.

The case made by the bill is that the Marginal Freight Railroad Company, which we shall hereafter call the Marginal Company, was organized under an act of the legislature of Massachusetts of the date of April 26, 1867, to build and operate a railroad through various streets in the city of Boston, "with all the privileges and subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street-railway corporations, so far as they are applicable." The right of way of this company for part of its route lay over the line of a railway previously granted to the Commercial Freight Railroad Company, and the Marginal Company, by virtue of a provision in its charter, purchased and

paid the Commercial Company for the joint use of its track, so far as it ran through the same streets. Afterwards, on May 6, 1872, the legislature of Massachusetts incorporated, by an act of that date, the Union Freight Railroad Company, which, by virtue of its charter and the authority of the board of aldermen of Boston, was authorized to run its track through the same streets and over the same ground covered by the track of the Marginal Company, and to take possession of the track of that and any other street-railroad company, on payment of compensation. This latter act also repealed the charter of the Marginal Company.

Sections 4, 6, and 7 of this act constitute the foundation of complainant's grievance, because they are said to impair the obligation of the contract found in the charter of the Marginal Company, and, as they are short, they are here given verbatim:—

“SECT. 4. Said corporation may, within its authorized limits and for the purposes of this act, enter upon and use any part of the tracks of any other street railroad, and may suitably strengthen and improve such tracks; and if the corporations cannot agree upon the manner and conditions of such entry and use, or the compensation to be paid therefor, the same shall be determined in accordance with the provisions of the thirty-eighth section of chapter three hundred and eighty-one of the acts of the year eighteen hundred and seventy-one.”

“SECT. 6. Said corporation shall, within four months from the passage of this act, take the tracks, or any part thereof, of the Marginal Freight Railway Company, subject to the laws relating to the taking of land by railroad companies and the compensation to be made therefor.

“SECT. 7. Chapter one hundred and seventy of the acts of the year eighteen hundred and sixty-seven, entitled an ‘Act to incorporate the Marginal Freight Railway Company,’ and so much of chapter four hundred and sixty-one of the acts of the year eighteen hundred and sixty-nine as relates to said Marginal Freight Railway Company, are hereby repealed.”

The bill avers that the Union Freight Railroad Company has been organized, and is about to proceed in such a manner under this act that the Marginal Company will be utterly destroyed, and its several contracts, franchises, rights, easements, and properties will be impaired and destroyed, and the stock of complainant in said company will be destroyed and made valueless, and he will sustain irreparable damage and mischief.

Complainant then alleges that he had requested and urged the directors of the Marginal Company to take steps to assert the rights and franchises of the company against what he believes to be unconstitutional legislation, and that they had declined and refused to do so. He also sets out a vote or resolution of said directors, in which they respond to his demand by saying that the assertion of the rights of the corporation in the State courts is accompanied with so many embarrassments that they decline to attempt it. The prayer of the bill is for

an injunction against all the defendants, to prevent these acts so injurious to the rights of the Marginal Freight Railroad Company.

The first ground of demurrer to this bill is that the complainant, whose interest is merely that of a stockholder in the Marginal Company, shows no right to sustain this bill, the object of which is to assert rights that are those of the corporation, which is itself under no disability to sue.

This whole subject was fully considered in the recent opinion of the court in *Hawes v. Oakland* (104 U. S. 450), in the decision of which we had the benefit of the able argument of counsel in this case, which was argued before that was decided. We refer to that opinion for the principles which must govern this branch of the present case. It is sufficient to say that this bill presents so strong a case of the total destruction of the corporate existence, and of the annihilation of all corporate powers under the act of 1872, that we think complainant as a stockholder comes within the rule laid down in that opinion, and which authorizes a shareholder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter.

As none of the defendants are charged with a purpose to exercise any power or to perform any acts not authorized by the terms of the act of May 6, 1872, the remaining question to be decided is, whether the features of that act to which complainant objects in his bill are beyond the power of the legislature of Massachusetts, or are forbidden by anything in the Constitution of the United States.

These exercises of power in the statute complained of are divisible into two : —

1. The repeal of the charter of the Marginal Company.
2. The authority vested in the Union Company to take its track for the use of the latter company.

It is the argument of counsel, pressed upon us with much vigor, that the two taken together constitute a transfer of the property of the one corporation to the other, and with it all the corporate franchises, rights, and powers belonging to the elder corporation.

We are not insensible to the force of the argument as thus stated; and we think it must be conceded that, according to the unvarying decisions of this court, the unconditional repeal of the charter of the Marginal Company is void under the Constitution of the United States, as impairing the obligation of the contract made by the acceptance of the charter between the incorporators of that company and the State, unless it is made valid by that provision of the General Statutes of Massachusetts, called the reservation clause, concerning acts of incorporation; or unless it falls within some enactment covered by that part of its own charter which makes it "subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street-railway corporations, so far as they may be applicable."

The first of these reservations of legislative power over corporations is found in sect. 41 of chap. 68 of the General Statutes of Massachu-

setts, in the following language: "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature."

It would be difficult to supply language more comprehensive or expressive than this.

Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it. This expression, "the pleasure of the legislature," is significant, and is not found in many of the similar statutes in other States.

This statute having been the settled law of Massachusetts, and representing her policy on an important subject for nearly fifty years before the incorporation of the Marginal Company, we cannot doubt the authority of the legislature of Massachusetts to repeal that charter. Nor is this seriously questioned by counsel for appellant; and it may, therefore, be assumed that if the repealing clause of the act of May 6, 1872, stood alone, its validity must be conceded. *Crease v. Babcock*, 23 Pick. (Mass.) 334; *Erie & N. E. Railroad Co. v. Casey*, 26 Pa. St. 287; *Pennsylvania College Cases*, 13 Wall. 190; 2 Kent Com. 306.

It is argued, however, that the act is to be examined as a whole, and that as the earlier sections of the statute bestow upon the Union Company the right to seize the track and other property of the Marginal Company, this repealing clause is inserted merely to aid in the general purpose of transferring a valuable property and its appurtenant franchise from one corporation to another.

Whether this is sufficient to invalidate that branch or feature of the statute may depend somewhat upon the effect of the repealing clause upon the rights of the Marginal Company, as well as upon other matters; but we do not doubt the validity of the repealing clause of that act, whatever may have been the reasons which influenced the legislature to enact it, for the exercise of this power is by express terms declared to be at the pleasure of the legislature.

The forty-first section of chapter 68, as we have cited it, had a proviso, as it was originally enacted, "that no act of incorporation shall be repealed, unless for some violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same." So that charters subject to the pleasure of

the legislative will were only those of perpetual duration. This proviso was, however, either repealed by express enactment or intentionally left out in subsequent revisions of the statutes, for it is not found in that of 1860, known as the General Statutes of Massachusetts, nor in that of the present year, just published, called the Public Statutes of Massachusetts.

What is the effect of the repeal of the charter of a corporation like this?

One obvious effect of the repeal of a statute is that it no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered and which were authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money.

If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights.

Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights.

And while we are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stockholders and the creditors of such a corporation after the act of repeal, we are of opinion that the foregoing observations are sufficient for the case before us.

A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power.

As early as 1806, in the case of *Wales v. Stetson* (2 Mass. 143), the Supreme Court of that State made the declaration "that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." In *Trustees of Dartmouth College v. Woodward* (4 Wheat. 518), decided in 1819, this

court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the Federal Constitution against impairing the obligation of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher v. Peck* (6 Cranch, 87) and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the State to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the State could not impair.

It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the State legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the Dartmouth College case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of *Wales v. Stetson*, 2 Mass. 143.

It would seem that the States were not slow to avail themselves of this suggestion, for while we have not time to examine their legislation for the result, we have in one of the cases cited to us as to the effect of a repeal (*McLaren v. Pennington*, 1 Paige (N. Y.), 102), in which the legislature of New Jersey, when chartering a bank with a capital of \$400,000 in 1824, declared by its seventeenth section that it should be lawful for the legislature at any time to alter, amend, and repeal the same. And Kent (2 Com. 307), speaking of what is proper in such a clause, cites as an example a charter by the New York legislature, of the date of Feb. 25, 1822. How long the legislature of Massachusetts continued to rely on a special reservation of this power in each charter as it was granted, it is unnecessary to inquire, for in 1831 it enacted as a law of general application, that all charters of corporations thereafter granted should be subject to amendment, alteration, and repeal at the pleasure of the legislature, and such has been the law ever since.

This history of the reservation clause in acts of incorporation supports our proposition, that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal.

This view is sustained by the decisions of this court and of other courts on the same question. *Pennsylvania College Cases*, *supra*; *Tomlinson v. Jessup*, 15 Wall. 454; *Railroad Company v. Maine*, 96 U. S. 499; *Sinking Fund Cases*, 99 id. 700; *Railroad Company v. Georgia*, 98 id. 359; *McLaren v. Pennington*, *supra*; *Erie & N. E. Railroad v. Casey*, *supra*; *Miners' Bank v. United States*, 1 Greene (Iowa), 553; 2 Kent, Com. 306, 307.

It results from this view of the subject that whatever right remained in the Marginal Company to its rolling-stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. It no longer had the right to cumber these streets with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in defendants only by virtue of the repealed charter.

It was, therefore, in the power of the Massachusetts legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company. Whether this action was oppressive or unjust in view of the public good, or whether the legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen; a judicial question in this case. It may well be supposed, if answer were required to the complainant's bill, that it was made to appear that the Marginal Company had shown its incapacity to fulfil the objects for which it was created, and that another corporation, embracing larger area, connecting with more freight depots and wharves, and with more capital, could better serve the public in the matter for which both franchises were given.

That in creating the later corporation, whose object was to fulfil a public use, it could authorize it to take such property of other corporations as might be necessary to that use, as well as that of individuals, can hardly admit of question. Sect. 4 of the act gives this power to the Union Company with reference to the tracks of all street railroads in the city, and provides that in the event of an inability to agree with the owners of these tracks as to compensation, that shall be determined in accordance with the provisions of general laws previously enacted on that subject. To this there can be no valid legal objection. The property of corporations, even including their franchises, when that is necessary, may be taken for public use under the power of eminent domain, on making due compensation. *West River Bridge Co. v. Dix*, 6 How. 507; *Central Bridge Corporation v. City of Lowell*, 4 Gray

(Mass.), 474; *Boston Water-power Co. v. Boston & Worcester Railroad Corporation*, 23 Pick. (Mass.) 360; *Richmond &c. Railroad Co. v. Louisa Railroad Co.*, 13 How. 71.

But it is the sixth section of the act which is most bitterly assailed as an invasion of appellant's rights. It declares that the Union Freight Company, within four months from the passage of the act, *shall* take the tracks, or any part thereof, of the Marginal Freight Company, subject to the laws relating to taking land by railroad companies and the compensation therefor. If, as the language seems to imply, the new company is bound to take so much of the track of the old one as it shall need or elect to use, and pay for it within four months, it is a requirement favorable to this company in preference to others, and with especial reference to the fact that its power to use the track for railroad purposes has ceased. If it is merely a permission to take the track on payment of compensation, it is still a favor to the Marginal Company to require this to be done within four months.

A suggestion is made that the Marginal Company acquired by purchase, for \$15,000, the right to the use of the track of the Commercial Freight Company, and that this property stands on different grounds from the remainder of its track.

We are unable to discover any difference in principle. If the new company takes this track, or takes the Marginal Company's right to use it, we suppose the latter will be entitled to compensation for its interest in it, as for other property taken for a public use.

In fact, in regard to the whole question discussed as to the mode of making compensation, and its sufficiency to indemnify the Marginal Company for what is taken, it seems to us to be premature; for whenever the attempt to adjust the compensation is made, the question of its sufficiency and its compliance with the law on that subject may arise, and it can then be decided.

Nor are we satisfied of the soundness of the argument of counsel that the clause in the Marginal Company's charter, which declares it to be subject to the restrictions and liabilities contained in the general laws relating to street railways, withdraws it from the operation of the forty-first section of chapter 68 of the General Laws of the State. The latter clause declares *all* acts of incorporation subject to its provisions. This subjection is not impaired by the fact that a particular corporation is made by its charter subject to other laws also of a general character.

We are of opinion that the question of the repeal of the charter of the Marginal Company is to be decided by the construction of the general statute, whose effect and history we have discussed.

These considerations require the affirmance of the decree of the Circuit Court sustaining the demurrer to appellant's bill.

Decree affirmed.

MR. JUSTICE GRAY did not sit in this case, nor take any part in deciding it.

PEOPLE v. O'BRIEN.

1887. (*In the Supreme Court*), 52 *New York Supreme Court* (45 *Hun*), 519.

1888. (*In the Court of Appeals*), 111 *New York*, 1.¹

THE questions in this case grow out of the legislative act purporting to annul and dissolve the Broadway Surface Railroad Company, and to repeal its charter.

Section 18, Article 3, Constitution of New York (adopted in 1875) provides, that no law shall authorize the construction or operation of a street railroad, except upon the condition that the consent of the local authorities having the control of the street be first obtained.

The Broadway Surface Railroad Company was organized May 13, 1884, under the act of May 6, 1884, chapter 252 (11 N. Y. Statutes at Large, 580-586). Chapter 252 is entitled "An Act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages." By the provisions of this chapter, individuals may, in certain prescribed methods, form a company for the purpose of constructing and operating street surface railroads. The corporation so formed may construct and operate such a railroad, provided that the consent of the local authorities be first obtained; and either the consent of one half in value of the abutting owners, or a decision of the court in favor of the construction. Section 7 provides, that the local authorities to whom application, under the provisions of this act may be made for consent to the construction, &c., of such a railroad, "may, at their option, provide for the sale of, and sell at public auction the franchise subject to all the provisions of this act, to so construct, maintain, use, operate or extend such street surface railway." Section 8 provides that every corporation under this act, within cities having a population of 250,000, or more, shall annually pay into the city treasury a specified percentage of its gross receipts. In smaller municipalities, the local authorities may require, as a condition to their consent to the construction of a road under this act, the annual payment to the municipalities of such percentage of gross receipts, not exceeding three per cent, as they may deem proper. The corporate rights, privileges and franchises acquired under this act, by any corporation which shall fail to comply with all the provisions of this section, shall be forfeited to the people of the State of New York, and upon judgment of forfeiture rendered in a suit brought in the name of the People by the Attorney General, shall cease and determine. Section 15 authorizes any street surface railroad company to lease or transfer its right, subject to all its obligations in respect thereof, to run upon or to use any portion of its

¹ Statement compiled from both reports. Arguments omitted. Only portions of the opinions are given. — ED.

tracks to any other such company authorized to run upon such route (with an exception in certain cases of parallel roads). Section 1 gives the corporation all the powers and privileges granted by the Act of April 2, 1850 (relative to the formation of railroad corporations), and the several acts amendatory thereof. One of the powers granted by the Act of 1850 and the amendatory Act of 1880, is the power "to mortgage their corporate power and franchises to secure the payment of any debt, . . ."

Section 19 provides that "the legislature may at any time alter, amend or repeal this act."

Section 1, enacts that the persons associating and the stockholders shall be a corporation, and shall be subject to the provisions of Title 3, Chap. 18, First Part Revised Statutes. One of those provisions is, that "the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

Section 1, also enacts that the corporation shall be subject to all the liabilities imposed by the Act of April 2, 1850, relative to the formation of railroad corporations. One of the provisions in the latter Act is, that "the legislature may at any time annul or dissolve any corporation formed under this act."

Section 1, Article 8, of the Constitution of New York provides that general laws and special acts relative to corporations "may be altered from time to time, or repealed."

Dec. 5, 1884, by resolution of the common council, the consent of the City of New York was given to the Broadway Surface Railroad Company to lay tracks and run cars over Broadway. This consent was given upon terms and conditions prescribed in the resolution, among which was the payment of a considerable sum of money to the municipality. The Broadway Surface Railroad Company, in lieu of the consent of the abutting owners, obtained a decree of the court in favor of constructing the road. The Broadway Surface Railroad Company mortgaged its property and franchises as security for contemplated loans, and its bonds were sold to a large amount. It also made contracts with other street railroad companies, owning roads connecting with its contemplated line, for the use of their several tracks by each other, for which it received a large present pecuniary consideration from each of said companies, besides the exchange of mutual benefits and accommodations. In 1885, the Broadway Surface Railroad Company constructed its track, and operated the road thenceforth until May 4, 1886.

On May 4, 1886, the legislature passed an Act (Chapter 268), declaring "that the corporation called the Broadway Surface Railroad Company . . . be and the same is hereby annulled and dissolved and its charter is hereby repealed."

On the same day, the legislature passed another Act (Chapter 271), enacting: 1. That whenever any street surface railroad company shall

have been dissolved or its charter repealed by the legislature, the consent of the abutting owners and of the local authorities shall not be deemed affected by such dissolution or repeal. 2. That the right to the further enjoyment and use of the said consents, and of all the powers, &c., thereby created, shall be sold at public auction by the municipal authorities. 3. That the purchaser at such sale shall have the right to the further enjoyment of such consents in like manner as if originally named therein, provided that such purchaser shall be otherwise authorized by law to construct and operate a street surface railroad within the municipality.

The Revised Statutes of New York, Part 1, Title 3, Chapter 18, Sections 9 and 10, provide that upon the dissolution of any corporation, unless other persons shall be appointed by the legislature, or by some court of competent authority, the directors or managers of the corporation at the time of its dissolution shall be the trustees of the creditors and stockholders, and shall have full power to settle its affairs.

May 11, 1886, the legislature passed an Act (Chapter 310), providing that whenever a corporation shall be dissolved by the legislature, it shall be the duty of the Attorney General to bring suit, in the name of the People, to wind up its affairs; and the court shall, in such suit, appoint a receiver. The Act also contains provisions as to the method of establishing claims of creditors.

Under the latter Act the Attorney General brought suit; and, on May 14, 1886, John O'Brien was appointed receiver, without notice to, or hearing, anyone on behalf of the company.

The present proceeding is a supplementary action, brought July 8, 1886, by the Attorney General in the name of the People of the State, against the City of New York, the receiver of the Broadway Surface Railroad Company, and numerous other corporations and persons, alleged to have had dealings with such company, either as stockholders, mortgagees, creditors or contractors. This supplementary action was brought for the purpose of obtaining a judgment declaratory of the rights and liabilities of the several parties, as affected by the dissolution of the corporation; determining the fact as to what were assets of the company, and the extent of the interests of the several parties therein; and restraining the mortgagees, contractors and others from taking legal proceedings to enforce their rights in, and liens upon, the property of the corporation.

At Albany Special Term, the case was tried by the court, without a jury. A judgment was rendered to the effect that the mortgages were valid liens upon the property of the company and upon its franchise to run a railroad, and survived the dissolution of the corporation; that the traffic contracts were not affected by the dissolution; that the Act (Chapter 271) providing for the sale of the franchise was unconstitutional; and that the part of the Procedure Act (Chapter 310) which provides a method of proving debts was also unconstitutional. By this judgment the Mayor of New York was enjoined from proceeding under the Franchise Disposal Act (Chapter 271).

From this decision an appeal was taken to the General Term.

Denis O'Brien, Attorney General, and *William A. Poste*, Deputy Attorney General, for the People.

Leslie W. Russell, for the Receiver.

Albert Stickney, *Thomas Allison*, *Stephen P. Nash*, *Edward W. Paige*, *James C. Carter*, *Elihu Root*, and *William C. Gulliver*, for various defendants.

LONDON, J.

The repealing act by its terms limits its destructive force to the corporation and its charter. Its language is: "The corporation . . . is hereby annulled and dissolved, and its charter is hereby repealed." Both corporation and charter were annihilated co-instantaneously. Although two phrases are used in the act, one dissolving the corporation, and the other repealing the charter, each phrase is a sentence of death. While alive the corporation had its charter and all its property and franchises. Whatever power of alteration or forfeiture the legislature possessed, was never exercised during the life of the corporation. It died therefore in the fullness of its rights and acquisitions. Of course when the corporation was dissolved, its physical power to operate this railroad was destroyed; the dead have no powers. Its franchise to be a corporation was destroyed; liberty to live cannot survive death. When the corporation was organized it was given life and endowed with faculties and powers to act and acquire in defined lines of business. By the exercise of its powers it could acquire property rights. But it was empty handed. What it obtained afterwards in the line of its proper business was its acquisition, not part of itself, but as distinct from it as the owner is from the thing owned.

It died full handed, and its dead hands dropped their holdings charged with every lien and burden lawfully created, into the living hands appointed by law to receive them. The owner was taken away; the property owned was left. This property consisted of two kinds, corporeal and incorporeal. The corporeal was the railroad upon Broadway, already constructed in pursuance of the grant of that right and interest in the soil of the surface of the street, sufficient to enable the company to make the construction thereon. If that grant, standing alone, was of sufficient quantity to enable the company to maintain the railroad upon the street, then the grant of the interest in the soil granted both the right to construct and maintain. The construction was an executed act, the maintenance an act for the future. No law could defeat acts already accomplished, but could, it is conceivable, defeat the performance of contemplated future acts, if the power to defeat them inhered in the title granted to the company. But to maintain a railroad upon a public street would be a nuisance unless authorized by law. (*Fanning v. Osborne*, 102 N. Y., 441.) The right to maintain this constructed railroad was therefore a franchise. So, also, was the right to operate it.

The franchises of a corporation, which form part of its life and body, must, of course, be held upon a life tenure. The franchise to construct, maintain and operate this railroad was an acquisition subsequent to the creation of the corporation. We may grant that, upon the creation of the corporation, it was endowed with the power to construct, maintain and operate this or any other street surface railroad, provided it should first obtain the right to do so. The power was a physical or personal attribute or capacity, like any man's power, honestly to get what he lawfully may; but no right to the franchise was obtained until it was acquired as the fruits of the exercise of the power to get it. This corporation did exercise its powers of acquisition, and did create and acquire this railroad, and therewith and as elements or qualities of this property, and so inseparable from it that they constitute its chief value, acquired its usable and usufructuary capabilities or properties. The particular franchises acquired came with the acquisition of this particular property. The distinction between the franchises which are strictly the personal attributes of the corporation, and the franchises which pertain to the uses to which its railroad property is fitted, is well recognized. (See cases, hereafter cited, as to the assignability of such franchises.) The distinction is just. What sort of a government would that be which, after inducing its subjects to create a railroad, should then forbid its use?

The common law rule that the tenure of such a franchise is for the life of the corporation has been materially changed by our statutes, and in the case of street surface railroads by article 3, section 18, of the State Constitution. The rule, as we believe it to be, is that to the extent that the Constitution and statutes have permitted the property franchises to be acquired by purchase instead of solely from the bounty of the State, the tenure depends upon the contract of purchase; and to the extent that the corporation has, under statutes authorizing it to do so, entered into contracts binding the property franchise, to that extent, the personal quality of the franchises has been changed into an assignable quality, and the life tenure into a tenure adequate to uphold such contracts. It may be conceded that to the extent that the property franchises have not been acquired or bound by contract, the common law tenure prevails.

The grant to this corporation of the interest in the surface of the soil of Broadway sufficient for the exercise of the right to construct, maintain and operate a railroad thereon, and also of the right itself, was initiated and completed in accordance with the provisions of chapter 252, Laws of 1884. This act was passed to carry into effect, among other conditions, the conditions provided by section 18, article 3, of the Constitution, adopted in 1875. This section provided that "no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of that portion of a street or highway upon

which it is proposed to construct or operate such railroad, be first obtained." Prior to the adoption of this provision of the Constitution it had been settled by the adjudications of the courts that the title to the land of the bed of the street was vested in the city in trust for the people of the State; that the adjoining owners had certain easements therein, but that the State had the right to authorize the construction of a railroad thereon without providing compensation either to the city or adjoining owners unless the owners would suffer some special injury. (*The People v. Kerr*, 27 N. Y., 188; *Kellinger v. Forty-second St., etc., R. R. Co.*, 50 id., 206; *Milbau v. Sharp*, 27 id., 611.)

The constitutional provision of 1875, above referred to, placed important restraints upon the power of the legislature to authorize the construction of railroads upon the streets, and imposed conditions to enable the city and property owners to protect their own interests against the improvidence of the State, or the rapacity of the railroad company. The grant of the franchise originates with the State as before, but power of the State to complete its grant, so as to vest it in the possession and enjoyment of the grantee, is made dependent upon the consent of the city and of the property owners; until this consent be given the grant is only inchoate, a mere tender upon conditions, and the conditions may never be performed by the city and property owners, or the grant be accepted by the grantee. The city and the property owners are thus brought in as parties whose consent is necessary. Some of the terms which the city may impose, as the price of its consent, are prescribed in chapter 252, Laws 1884. Section 7 provides that: "The local authorities of any incorporated city or village, to whom application under the provisions of this act may be made for consent to the construction, maintenance, use, operation or extension of a street surface railroad upon any street, . . . may, at their option, provide for the sale of, and sell at public auction the franchise, subject to all the provisions of this act." Thus the legislature expressly makes the franchise purchasable property. It may be observed that a franchise, purchasable in the first instance at public auction, is obtainable upon other considerations than the gracious favor of the sovereign and special personal confidence and trust in the grantee, which form the basis of a tenure for life.

The State, therefore, may not vest its grant of the franchise in the grantee except in pursuance of the terms of such contract conditions as the city and grantee enter into, and to which the State has pledged its consent in advance. The interest in the land on the surface of the street, and the franchise to construct, maintain and operate the railroad thereon, all pass together to the grantee, upon the completed execution of the grant by all the grantors, and its acceptance by the grantee. The contract between the city and the grantee, to which the State is also a consenting party, is thus authorized by the State Constitution, and the National Constitution forbids the State to impair its obligations. (U. S. Const., art. 1, § 10.) The consent of the property owners may also be based upon contract equally inviolable.

It follows that the tenure of the grant of the interest in the real estate of the street and of the franchise, must be adequate to uphold the contracts upon which the consents were obtained, and also be of the extent expressed in such contracts. It is objected that such construction practically defeats the intention of the legislature in dissolving the corporation. That intention must, of course, be controlled by the constitutional protection of contract obligations. Neither public nor private interests are supposed to be promoted by the destruction of valuable property, and no person or corporation can be deprived of vested rights in property except upon due process of law. When the Constitution made the vesting of this franchise dependent upon the execution of a contract between the city and the company, it allowed the franchise to become the subject-matter of the contract, and the consideration upon which it was entered into; and since the subject-matter and consideration cannot be withdrawn from the obligations of the contract without impairing those obligations, the Constitution places it beyond the power of the State, without the consent of both city and company, to withdraw this franchise. Its reserved power was limited to the destruction of the powers it gave to the company as a part of its life and being, and to the regulation of those powers and the property rights the company acquired by their exercise, and did not extend to the destruction of such rights.

The power of the legislature to resume, by right of eminent domain for public purposes, such property rights, upon making just compensation, may also be conceded. (*Sixth Av. R. R. Co. v. Kerr*, 72 N. Y., 330.) If the State also retains the power to impair its own contract with the company in its part of the grant, it does not reserve the power to impair the contract of the city and company, and since in this case one contract cannot be impaired without impairing the other, neither can be. (*Commonwealth v. Essex Co.*, 13 Gray, 239.) Plainly property rights acquired by the corporation by the exercise of its corporate powers are vested rights, and the contract with parties other than the State, whereby they were lawfully secured, are within the protection of the National Constitution.

The consent of the city was given by its common council to the Broadway Surface Railroad Company upon the agreement of the company, secured by an adequate bond, to pay the city \$40,000 per year by way of rent, also three per cent upon its earnings for the first five years and five per cent per year thereafter, and to do and perform certain other things burdensome to the company and beneficial to the city. The consent was "to construct, maintain, operate and use a street surface railroad for public use in the conveyance of persons in cars" on Broadway, between designated *termini*. This consent was formally accepted by the company. No term of time is expressed in the consent. For five years three per cent per year of the earnings must be paid, and five per cent per year thereafter, thus indicating an indefinite length of time after five years. The consent is given upon

condition that the provisions of chapter 252, Laws of 1884, shall be complied with, and also upon the condition that if the company should fail to pay the percentages, the provisions of the act providing for a forfeiture of the franchise upon judgment in a suit to be brought by the attorney general should be applicable. This consent and acceptance constitute a contract.

Prior to the adoption of the constitutional amendment of 1875, the effect of such a contract, substantially, as was here entered into between the company and the city, provided there were the constitutional and legislative power to make it, had been frequently discussed by the courts, and the substance and effect of the decisions were, that thereby a grant, both of an irrevocable property interest in the street and of the franchise to construct, maintain and operate the railroad and take tolls thereon, would be made.

Independently of the peculiar features of a grant of property franchise to street surface railroads impressed upon the grant by the constitutional provision of 1875, such franchises, as the cases above cited, touching their assignability, show, have the same assignability as the franchises of other railroad companies. This proceeds from the act authorizing the incorporation, and the statute referred to therein, already quoted, authorizing the company to mortgage its franchises. The statute which authorizes the mortgage of the franchises imports a tenure adequate to uphold the mortgage.

The fifteenth section of chapter 252, Laws 1884, expressly provides for the lease or transfer, by one street railroad company to another duly authorized, of the right to run upon, or use any portion of the street railroad tracks. This implies the assignability of the franchise, to the extent necessary to uphold such lease or transfer.

It follows from what we have said that, upon the dissolution of the corporation, the railroad and the franchise to maintain, construct and operate it were not destroyed or impaired, but passed as a legal estate, charged with the mortgages and burdens legally placed thereon, to the directors of the Broadway Surface Railroad Company, as trustees of the creditors and stockholders of the company. (1 R. S. m. p. 600, § 9.) The act (chap. 310, Laws of 1886) provided for transferring this trust from the directors to the receiver.

The property of the Broadway Surface Railroad Company and franchise to construct, maintain, operate and use it, if the foregoing views are correct, are now vested in the receiver, subject to the mortgages, contracts and conditions by which the same were bound at the instant of the dissolution of the company. Since none of these were impaired in their lien upon the property and franchise, it follows that they are as valid against the receiver as they were against the company. If the

company could not defend against the mortgages, the receiver cannot. If the company could not defend against the traffic contracts, the receiver cannot. If the company acquired the benefit of the contracts and orders, whereby the consents of the city and property owners were vested in the company, the same benefit is vested in the receiver for the benefit of the stockholders and creditors. No legislation could validly impose upon or vest in the receiver the right or power to divest this estate of any of its rights or property and bestow them, or any of them, upon the city or State, except upon just compensation. The statute (chap. 271, Laws of 1886), so far as it provides for the sale of the consents of the city and property owners, is, therefore, void.

[Remainder of opinion omitted.]

BOCKES, J., concurred in the conclusion.

LEARNED, P. J., concurred, except as stated in his opinion [which holds that the act relative to the appointment of a receiver without notice is invalid; and also that the legislature had no power to dissolve a corporation formed under a general law.]

From a judgment entered in accordance with the above opinion of LANDON, J., appeals were taken by various parties. The case was argued in the Court of Appeals, March 5, 1888.

Charles F. Tabor, Attorney General, and *William A. Poste*, for the People.

Denis O'Brien, for the Receiver.

James C. Carter, Elihu Root, Albert Stickney, Nelson S. Spencer, S. P. Nash, Lyman Rhoades, Edward W. Paige, Thomas Allison, and William C. Gulliver, for various defendants.

RUGER, C. J.

The statutes upon which the action is predicated, confessedly assume the right and power of the legislature to wrest from the company its franchises; to transfer them to other persons, and bestow their value upon the donees of the state. The statutes contemplate the absolute destruction of the property of the corporation, and the loss of its value to the creditors who have made loans in good faith upon the security of such property, and this action is avowedly prosecuted to accomplish the purposes of the legislation. It is, therefore, urgently contended by the attorney-general that none of the franchises of the corporation survived its dissolution, and that the mortgages previously given thereon, as well as all contracts made with connecting street railroads for the mutual use of their respective roads, fell with the repeal and could not be enforced.

When we consider the mode required by the statutes and the Constitution, to be pursued in disposing of this franchise, the inference as to its perpetuity seems to be irresistible, for it cannot be supposed that either the legislature or the framers of the Constitution intended

to offer for public sale property the title to which was defeasible at the option of the vendor, or that such property could be made the subject of successive sales to different vendees, as often as popular caprice might require it to be done.

Neither can it be supposed that they contemplated the resumption of property, which they had expressly authorized their grantee to mortgage and otherwise dispose of, to the destruction of interests created therein by their consent.

We are, therefore, of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway through its grant from the city, under the authority of the Constitution and the act of the legislature. It is also well settled by authority in this state that such a right constitutes property within the usual and common signification of that word. (*Sixth Ave. R. R. Co. v. Kerr*, 72 N. Y. 330; *People v. Sturtevant*, 9 id. 263.)

But even if it be conceded that the constitutional provisions place the right to repeal charters, as well as laws, beyond the power of legislatures to waive or destroy, the question still remains as to the effect of such a repeal upon the franchises of the corporation; whether it contemplates anything more than the extinction of the corporate life, and consequent disability to continue business, and exercise corporate functions after that time, or has a wider scope and effect.

It may be assumed in this discussion that the authority of the legislature to repeal a charter, if it has expressed its intention to reserve such power in its grant, constitutes a valid reservation. Parties to a contract may lawfully provide for its termination at the election of either party, and it may, therefore, be conceded that the state had authority to repeal this charter, provided no rights of property were thereby invaded or destroyed. In speaking of the franchises of a corporation we shall assume that none are assignable except by the special authority of the legislature. We must also be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz., those requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge and similar companies, and not to those which are in their nature purely incorporeal and inalienable, such as the right of corporate life, the exercise of banking, trading and insurance powers, and similar privileges. The franchises last referred to being personal in character and dependent upon the continued existence of the donee for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise made. (*People v. B., F. & C. I. R. R. Co.*, 89 N. Y. 84; *People v. Metz*, 50 id. 61.)

In the former class it has been held that at common law real estate acquired for the use of a canal company could not be sold on execution against the corporation separate from its franchise, so as to destroy or impair the value of such franchise. (*Gue v. Tide Water Canal Co.*,

24 How. [U. S.] 257), and by parity of reasoning it must follow that the tracks of a railroad company, and the franchise of maintaining and operating its road in a public street, are equally inseparable, in the absence of express legislative authority providing for their severance.

The statute of our state authorizing the sale of the franchise and property of a railroad company on execution, seems to recognize the indissolubility of the connection between the corporeal property, and its incorporeal right of enjoyment.

It is also to be observed that in none of the provisions for repeal in this state is there anything contained, which purports to confer power to take away or destroy property or annul contracts, and the contention that the property of a dissolved corporation is forfeited, rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his. (*Mumma v. Potomac Co.*, 8 Pet. 281, 285.)

The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred. (*Butler v. Palmer*, 1 Hill, 335.)

The authorities seem to be uniform to the effect that a reservation of the right to repeal, enables a legislature to effect a destruction of the corporate life, and disable it from continuing its corporate business (*People ex rel. Kimball v. B. & A. R. R. Co.*, 70 N. Y. 569; *Philips v. Wickham*, 1 Paige, 590), and a reservation of the right to alter and amend confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the Federal Constitution upon legislation impairing the obligation of contracts. (*Munn v. Illinois*, 94 U. S. 113, 123.)

We think no well considered case has gone further than this, while in many cases such power has been expressly held to be limited to the effect stated. In the language of Chief Justice MARSHALL in *Fletcher v. Peck* (6 Cranch, 87, 135): "If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights."

It would seem to be quite obvious that a power existing in the legislature by virtue of a reservation only, could not be made the foundation of an authority to do that which is expressly inhibited by the Constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty or property of citizens beyond the scope of express constitutional power.

In *Erie & N. E. Railroad Company v. Casey* (26 Penn. St. 287, 301), the question arose under a statute which specially provided that the state might resume all rights conferred in case of an abuse or misuse of the powers granted to the corporation. Upon an alleged abuse of power, the legislature repealed the charter and resumed the subject of the grant. The corporation forfeited its rights by its voluntary act. The reservation in the charter was expressly made a condition subsequent. The case was between the representative of the state and the railroad corporation, and no rights of creditors, mortgagees or stockholders were involved in its decision. It also appears by the case that the state and the corporation had settled their controversy by compromise during the pendency of the litigation, and it can hardly be said to have involved any practical question.

We are, therefore, of the opinion that the Broadway Surface Company took an indefeasible title to the land necessary to enable it to construct and maintain a street railroad in Broadway, and to run cars thereon for the transportation of freight and passengers, which survived its dissolution.

We are thus brought to the question of the right of succession to the property of a dissolved corporation in the absence of any provision in the act of dissolution*providing for such an event.

The judgments of the Special and General Terms should be reversed and the complaint dismissed, with costs to the defendants other than the receiver.

All concur, except PECKHAM and GRAY, J. J., not sitting.

ANDREWS and EARL, JJ., concur in the result upon these grounds: (1.) The annulling act is constitutional and valid, and its effect was only to take the life of the corporation. (2.) All the property of the corporation, including its street franchises and its mortgages and valid contracts, including what are called the traffic contracts with other railway companies survived. (3.) The act chapter 271 is unconstitutional. (4.) That act and the act chapter 310 are parts of the same scheme adopted by the legislature for the purpose of winding up the affairs of the corporation and disposing of and distributing its property. The main features of the latter act are unconstitutional and void, and thus so much of the legislative scheme has failed that there is not enough left to save the whole act from condemnation. (5.) As the latter act is thus wholly void, and this action is founded and depends solely upon it, there is no warrant for its maintenance; and, therefore, the judgment should be reversed and complaint dismissed.

All concur.

Judgment accordingly.

SECTION IV.

Reserved Power of Legislature to alter or amend Charter.

TOMLINSON v. JESSUP.

1872. 15 *Wallace* (U. S.), 454.¹

APPEAL from the U. S. Circuit Court for the District of South Carolina.

Bill in equity by stockholder in Northeastern Railroad Company, to enjoin state officials from levying a tax on the property of the road. The N. E. R. Co. was incorporated in 1851 by the legislature of South Carolina. At that time the 41st section of the act of 1841 was in force, as follows :

“It shall become part of the charter of every corporation, which shall, at the present, or any succeeding session of the General Assembly, receive a grant of a charter, or any renewal, amendment, or modification thereof (unless the act granting such charter, renewal, amendment, or modification shall, in express terms, except it), that every charter or incorporation granted, renewed, or modified as aforesaid, shall at all times remain subject to amendment, alteration, or repeal, by the legislative authority.”²

The act of incorporation did not except the charter of the company from the operation of this section.

By an amendment of the charter passed in 1855, it was enacted as follows :

“That the stock of the said company, and the real estate that it now owns or may hereafter acquire, which is connected with or subservient to the works authorized in the charter of the said company, shall be, and the same is hereby exempted from all taxation during the continuance of the present charter of the said company.”³

The constitution of South Carolina, adopted in 1868, provided that the property of corporations then existing, or thereafter created, should be subject to taxation. Statutes were subsequently passed providing for taxing property of railroad companies, under which state officials were proceeding to tax the property of the Northeastern R. R. Co.

The court below granted a final injunction. The defendants appealed *D. T. Corbin*, and *D. H. Chamberlain*, for appellants.
T. G. Barker, *contra*.

¹ Statement abridged. — Ed.

² Stat. at Large, vol. 11, p. 168.

³ *Ib.*, vol. 12, p. 407.

FIELD, J.

The provisions of that law [the act of 1841], therefore, constituted the condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made. They were as operative and as much a part of the charter and amendment, as if incorporated into them.

The act amending the charter of the Northeastern Railroad Company, passed in December, 1855, provided that the stock of the company, and the real estate it then owned, or might thereafter acquire, connected with or subservient to the works authorized by its charter, should be exempted from taxation during the continuance of the charter. This act contained no clause excepting the amendment from the provisions of the general law of 1841. It was, therefore, itself subject to repeal by force of that law.

It is true that the charter of the company when accepted by the corporators constituted a contract between them and the State, and that the amendment, when accepted, formed a part of the contract from that date, and was of the same obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrevocable and protected from any measures affecting its obligation.

There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. It has nevertheless been held by this court, not, however, without occasional earnest dissent from a minority, that the power of taxation over particular parcels of property, or over property of particular persons or corporations, may be surrendered by one legislative body, so as to bind its successors and the State. It was so adjudged at an early day in *New Jersey v. Wilson*; ¹ the adjudication was affirmed in *Jefferson Bank v. Skelly*; ² and has been repeated in several cases within the past few years, and notably

¹ 7 Cranch, 164.

² 1 Black, 436.

so in the cases of *The Home of the Friendless v. Rouse*¹ and *Wilmingtton Railroad v. Reed*.² In these cases, and in others of a similar character, the exemption is upheld as being made upon considerations moving to the State which give to the transaction the character of a contract. It is thus that it is brought within the protection of the Federal Constitution. In the case of a corporation the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made, as in the present case, by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation. Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State. Rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The State only asserts in the present case the power under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired.

DECREE REVERSED, and the cause remanded with directions to

Dismiss the suit.

BUFFALO & N. Y. CITY R. R. CO. v. DUDLEY.

1856. 14 *New York* (4 *Kernan*), 336.³

ACTION to recover the amount subscribed by the defendant to the capital stock of the Attica and Hornellsville Railroad Company. The corporation was chartered in 1845, with a capital of \$750,000. In 1847, defendant subscribed for twenty shares. At the time of the subscription the act of incorporation authorized the construction of a

¹ 8 Wallace, 430.

² 13 Id. 264.

³ Statement abridged. Only so much of the case is given as relates to a single point. — Ed.

railroad from Hornellsville to Attica, a distance of sixty miles. The right to alter or repeal was reserved to the legislature in the act of incorporation. On the 31st of March, 1851, an act was passed by the legislature to amend the charter of said company so as to authorize said company to extend the road to the city of Buffalo, to change the corporate name, and to increase its capital stock to \$1,500,000. On the 16th of April, 1851, the directors of the company met in pursuance of the last named act and accepted it; changed the name of the corporation to the present name; extended the road to Buffalo, a distance of thirty-one miles beyond Attica, and increased the capital stock to the prescribed amount.

The defendant's answer set up as a defence to the action, that the plaintiff's charter had been altered and its road extended after his subscription and without his consent, and alleged that such alteration and extension were prejudicial to his interest as a stockholder.

At the trial defendant moved for a nonsuit on the following grounds (among others): Fifth, that defendant never subscribed to any stock in a road from Hornellsville to Buffalo. Sixth, that by the alteration of the charter in a fundamental part and extending the road, the defendant was absolved from his obligation to pay his subscription. The motion for a nonsuit was overruled, and defendant excepted.

The defendant then offered to prove the cost of the extension from Attica to Buffalo; that it was injurious to his interests, and was made without his consent or concurrence; but the evidence was excluded, subject to defendant's exception.

The court, against defendant's objection, ruled that there was nothing to go to the jury, and directed a verdict for plaintiff. A judgment entered upon this verdict was affirmed at the General Term of the Supreme Court. Defendant appealed.

John Ganson, for appellant.

H. W. Rogers, for respondent.

T. A. JOHNSON, J.

The subscription having been valid, so as to give a right of action, in case of non-payment, to the corporation, did the alteration of the charter and the extension of the road subsequently absolve the defendant from his liability upon such subscription? This question is, I think, entirely settled by the decision of this court in the case of *Schenectady and Saratoga Plank Road Company v. Thatcher* (1 Kern., 102). The right to alter was reserved in the charter, and the subscription must be taken to have been made subject to having such additional powers conferred as the legislature might deem essential and expedient. The change is not fundamental. The new powers conferred are identical in kind with those originally given. They are enlarged merely, the general objects and purposes of the corporation remaining still the same. It may be admitted that, under this reserved power to alter and repeal, the legislature would have no right to change the fundamental

character of the corporation and convert it into a different legal being, for instance, a banking corporation, without absolving those who did not choose to be bound. But this they have not attempted to do. The additional powers are of the same character, and have been regularly acquired from the legitimate source of power, and if they have been fairly exercised, the defendant, although the change may have operated to his pecuniary disadvantage, is still bound by his undertaking. It is no breach of the agreement between the plaintiff and the defendant. It might, perhaps, be inferred from some expressions in the opinion of Parker, J., in the *Schenectady and Saratoga Plank Road Company v. Thatcher* (*supra*), that that case turned in some measure upon the fact that there was no suggestion or proof of injury to the defendant's interests resulting from the change complained of. It is obvious, however, that the decision was not based upon any such consideration. It is manifestly a question of power; and if the power was legitimately acquired, and has been exercised without fraud, the rights of the parties are in no respect changed as between themselves, whether the alteration is beneficial or injurious to the defendant's interest. Whether he has made or lost by the change, in no respect affects the question of authority in the plaintiff.

SELDEN, J.

The point made by the defendant upon the alteration of the plaintiff's charter, changing the name of the corporation and authorizing the extension of its road from Attica to Buffalo, must, I think, be considered as sufficiently answered by the decision of this court in the case of *The Schenectady and Saratoga Plank Road Company v. Thatcher* (1 Kern., 102). The power reserved to the legislature in the original act of incorporation, to alter or repeal the act, is as broad in this case as in that. It is, indeed, entirely unlimited. Under the rule established in that case, no mere addition to or alteration of the charter, however great, would operate to discharge a stockholder from his obligation to the corporation. To work such a discharge the charter must be repealed, or the legislation must be such as virtually to subvert the corporation itself; or, at least, to destroy its identity. A mere change of name has been repeatedly held not to have that effect. (*Mayor of Scarborough v. Butler*, 3 Lev., 238; *Mayor of Colchester v. Seaber*, 3 Burr., 1866; *Mellor v. Spateman*, 1 Saund., 344, note 1; *Overseers, &c., of North Whitehall v. South Whitehall*, 3 Serg. & Rawle, 117.) In other respects the change in this case is not materially greater than in that of *The Schenectady and Saratoga Plank Road Company v. Thatcher* (*supra*). It does not become necessary, therefore, to take into consideration the soundness of the principles advanced in the case of *The Hartford and New Haven Railroad Company v. Croswell* (5 Hill, 383). That case is in direct conflict with several English cases, as well as with some decided in this country;

and a portion of its reasoning would, I think, require to be examined with some care before it is finally adopted. (*Midland Railway Company v. Gordon*, 16 *Mees. & Wels.*, 803; *Stevens v. The South Devon Railway Company*, 13 *Beav.*, 48; *Ffooks v. The London and South Western Railway Company*, 19 *L. & Eq. R.*, 7; *Irwin v. The Turnpike Company*, 2 *Penn.*, 466; *Gray v. The Monongahela Navigation Company*, 2 *Watts & Serg.*, 156.)

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COMMONWEALTH v. ESSEX COMPANY.

1859. 13 *Gray*, 239.¹

INDICTMENT against the Essex Company on the Statute of 1856, Chap. 289, for neglecting to make and maintain around their dam across the Merrimac River, at Lawrence, a suitable and sufficient fishway for the usual and unobstructed passage of fish.

The Essex Co. was chartered in 1845 for the purpose, among other things, of constructing a dam across Merrimac River. By the charter the corporation was required to make and maintain, in such dam, suitable and reasonable fishways; to be built in the mode to be prescribed by the county commissioners; and to be accepted by the commissioners. The company did construct fishways in their dam, according to the prescription of the commissioners, and to their satisfaction as having been built according to their prescription; and the company have maintained the same during the time mentioned in the indictment. After it had become well known that the said fishways did not, in fact, afford a usual and unobstructed passage, an additional act was passed by the legislature, in May, 1848. By this act the company were authorized to increase their capital stock, but upon the express condition "that said company shall be liable for all damages which shall be occasioned to the owners of fish rights existing above the said company's dam, by the stopping or impeding the passage of fish up and down the Merrimac River by the said dam." A mode of assessing these damages was provided by the act. A second section of this act of 1848 provided that it should take effect upon acceptance by the stockholders and the filing of an authenticated copy of the vote of acceptance. Such a vote was passed, and a copy duly filed. Soon after, the defendant company paid, under said act, about \$26,000, to various owners of fish rights above said dam, as damage for hindering or impeding the passage of fish.

June 6, 1856, the legislature passed the act upon which the present

¹ Statement abridged. Arguments and part of opinion omitted. — ED.

indictment is founded; requiring the Essex Company, before the 1st of February, 1857, to make, and forever thereafter maintain, in or around their dam in Lawrence, a suitable and sufficient fishway for the usual and unobstructed passage of fish, under a penalty of not less than \$100 nor more than \$500 a day for the time they should neglect to make and maintain such fishway after said 1st of February. The first cost of such a structure would amount to a sum variously estimated at from \$10,000 to \$40,000.

The company, having failed to provide any new fishway after the passage of this act, were indicted for such neglect. Upon the trial, the company offered to prove the above facts as to the approval of the fishways by the commissioners, and the payment of damages under the act of 1848; but the evidence was excluded, and the jury were instructed to return a verdict of guilty. Defendants excepted.

R. Choate, and *E. Merwin*, for defendants.

S. H. Phillips, Attorney General, for the Commonwealth.

SHAW, C. J.

It seems to be well settled that the obstruction of the passage of the annual migratory fish through the rivers and streams of the commonwealth, is not an indictable offence at common law. But the right to have these fish pass up rivers and streams to the head waters thereof is a public right, and subject to regulation by the legislature; though the right to take fish in waters not navigable belongs to the riparian owners of the soil along the shores and banks of such rivers and streams. *Commonwealth v. Chapin*, 5 Pick. 199. The liability, therefore, of the defendants to this indictment depends upon the statute.

From this view of the law of Massachusetts, we come to the conclusion, that from the earliest times the right of the public to the passage of fish in rivers, and the private rights of riparian proprietors, incident to and dependent on the public right, have been subject to the regulation of the legislature; and the mode adopted by the legislature, whether by public or private acts, to secure and preserve such rights, has been by requiring, in the erection of dams, such sluices and fishways as would enable these migratory fish, according to their known habits and instincts, to pass from the lower to the higher level of the water, occasioned by such dam, so that, although their passage might be somewhat impeded, it would not be essentially obstructed thereby. This was the only remedy, because no private action would lie for the riparian proprietor, and no indictment at common law for the public injury.

3. We are now to consider what are the true construction and operation of the act of incorporation, by which the defendants were constituted and chartered.

All provisions of statute, made for regulating the fisheries, are intended for the public benefit, and all persons, at their peril, must take

notice of them; they are therefore public statutes, and the courts of law will, *ex officio*, take notice of them. *Burnham v. Webster*, 5 Mass. 266. *Commonwealth v. M'Curdy*, 5 Mass. 324.

The objects proposed to be accomplished by the defendants were so far public in their nature, and designed to promote the public benefit, that it was quite competent for the legislature to exercise the power of eminent domain, by authorizing them to take private property when necessary, providing modes by which a full compensation therefor should be made. These objects were to establish a great water power for manufacturing and mechanical purposes, and for improving the navigation of the river by locks and canals. *Boston & Roxbury Mill Dam v. Newman*, 12 Pick. 467. *Hazen v. Essex Co.* 12 Cush. 477, 478. The usual provision was made for the assessment and payment of damages, which is made where private property is authorized to be taken for public use.

The usual provision was also made for the preservation of the rights of fishery, both public and private, which have been made in like cases, by requiring the company to make and maintain fishways in said dam, which should be made to the satisfaction of the county commissioners. We believe it has been usual, in such acts of legislation, to delegate an authority to a committee or commissioners, to see that certain provisions are specifically carried into effect; and we have never known the legality of such delegation of power questioned. In the leading case of *Stoughton v. Baker*, before cited, it was held that where a certain portion of the things authorized to be done by a committee of three was done by one, to that extent the power was not well executed.

It appears by the facts that the county commissioners did, in due form, prescribe the mode in which fishways should be made, and they were so made, and afterwards maintained, to the time of finding this indictment, in the mode thus prescribed. Under these circumstances, we are strongly inclined to the opinion that the company had performed the condition on which their charter was granted, and would be free from public prosecution. Whether, if the fishways actually provided had proved wholly unfit and inadequate to their purpose, and other measures could be provided within a reasonable cost, which could be shown to be probably effectual, the legislature could, by further legislation, have required the company to construct such other fishways, we give no opinion, for reasons which will appear in our construction of the additional act.

4. In putting a construction upon the additional act, (*St.* 1848, c. 295,) it is important to note the date, and the circumstances under which it was passed. At that time the dam had been in operation some time, with the fishway prescribed, and proved to be unsuitable or insufficient to accomplish the proposed purpose of providing for the passage of the fish. It appears that the company required legislative aid to enable them to increase their capital stock. It seems that the legislature seized the opportunity to make a better provision for the

security of the fisheries, than that required in the act of incorporation had proved to be. This they did by a scheme to be proposed to the company by way of condition, and acceded to by them in legal form; a scheme entirely different from that proposed in the act of incorporation, and different from any which had been previously adopted in any similar case.

The legislature had the power to regulate the public right, and diminish it or release it, as the best good of the public, on the whole, might in their judgment require. Whether that public good, expected from the fishery, consisted in affording an additional article of food to the people, or an employment for labor, or otherwise, the legislature might well compare this with the public advantage, in affording increased profitable labor and means of subsistence, and various benefits, from building up a large manufacturing town, and decide as the balance of public benefit should preponderate. Of this they must judge. *Boston & Lowell Railroad v. Salem & Lowell Railroad*, 2 Gray, 1.

But the legislature stood in a more delicate relation towards the various riparian owners of fish rights above the dam. The extinction of the public right to have the fish pass the dam would deprive these owners of their several fisheries, which were in effect private property. Towards them, therefore, the public stood, in some respects, as trustees, and their beneficial interests could not honorably be disregarded. The plan, therefore, proposed by this enactment, was to substitute, for the public right intended to be provided for by the fishways required, a provision for the payment of damages by the company to every riparian owner of fishing rights along the river above said dam, giving them a remedy against the company where none existed before, for all damages occasioned by the stopping or impeding the passage of fish up and down the Merrimac River by the said dam. It declared that the provision in the 7th section of the former act, requiring the making and maintaining of such fishways as the county commissioners should prescribe, should not be deemed a bar to such private claim for damages; implying that, but for this clause, such provision for fishways would have been a bar to any private claim for damages. It provides an easy and constitutional mode for every such private owner to obtain his damages, to be used, if the same should not be adjusted and paid by agreement, which each such private owner would have a right to make, in respect to his own several interest. It was the substitution of one onerous duty upon the company for another, more equitably and effectually to accomplish the same object.

To preclude all question as to the right of the legislature thus to impose a new obligation upon the company, it was provided that the act should not take effect until it should be in terms accepted at a meeting of stockholders called for that purpose, and authentic evidence thereof filed in the office of the secretary of the Commonwealth, for the information and benefit of all persons concerned, as well those individual riparian owners who might claim their rights under it, as those

persons who might afterwards acquire or hold shares in the stock of said company. This appears to us to be the direct meaning and construction of this enactment. It was not a new provision, requiring the better performance of a preëxisting duty; it was substituting a new species of indemnity to parties, where none in any form existed before, either by an action of tort at common law, or by a claim for damages under any statute.

Under these circumstances, it appears to us, especially after it has been acceded to by the company, and after they have paid a large sum of money in pursuance of it, that this enactment has in it all the elements of a contract, executed by one party and binding on the other.

5. The remaining question is whether the act of 1856 is justified by the provision in the Rev. Sts. c. 44, § 23, that acts of incorporation afterwards passed should be subject to amendment, alteration or repeal? That provision is, that every act of incorporation shall at all times be subject to amendment, alteration or repeal, at the pleasure of the legislature; provided, that no such act shall be repealed, unless for violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same.

The power of repeal is limited and qualified, and was so considered in the case of *Crease v. Babcock*, 23 Pick. 334.

Does this come within the power of the legislature to amend or alter? It seems to us that this power must have some limit, though it is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business; and they purchased such lot from a third party; could the legislature prohibit the company from holding it? If so, in whom should it vest; or could the legislature direct it to revert in the grantor, or escheat to the public; or how otherwise?

Suppose a manufacturing company incorporated is authorized to erect a dam and flow a tract of meadow, and the owners claim gross damages, which are assessed and paid; can the legislature afterwards alter the act of incorporation so as to give to such meadow-owners future annual damages? Perhaps from these extreme cases — for extreme cases are allowable to test a legal principle — the rule to be extracted is this; that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.

It appears to us, in the present case, that after the government, acting in behalf of the public, and also of all those riparian owners whose fish rights would be damnified by the defendants' dam, with the fishway as it was, entered into a solemn and formal contract with the defendant company to exempt them from the obligation of making and maintaining a suitable and sufficient fishway, if such were practicable, by indemnifying all parties damnified in their several fisheries, and the defendant company had executed their part of the contract by the pay-

ment of a large sum of money, it was not competent for the legislature, without any change of circumstances, under their authority to amend and alter the charter of the company, to pass a law requiring them to do the acts from which, by the terms of such contract, they had been exempted, and therefore that the said act was null and void, and this indictment founded upon it cannot be maintained.

Exceptions sustained.

DURFEE v. OLD COLONY AND FALL RIVER R. R. CO.

1862. 5 *Allen (Mass.)*, 230.¹

BILL IN EQUITY by minority stockholder to restrain defendants, a Massachusetts corporation, from extending their road or from uniting with another railroad company.

The case was heard upon bill, answer, and demurrers. The material facts appearing on the bill and answer were as follows.

The defendants' charter was, by virtue of *Statute* 1830, *chap.* 81, subject to alteration, amendment or repeal, at the pleasure of the legislature. The charter authorized the construction of a railroad from Fall River to Boston; and the company has accumulated a large surplus fund by its business over that route. In 1861, the legislature passed an act authorizing the defendants to extend their road from their present terminus in Fall River to the Rhode Island line, and to connect with a railroad to be constructed from Newport, R. I., to the Massachusetts line. Under this act no part of the surplus can be used to build the extension, or to build the road in Rhode Island; but the capital stock may be increased two thousand shares. The act was to be void unless accepted by the corporation at a stockholders' meeting. It was accepted by a majority vote, against plaintiff's objection. In 1862, another act was passed, authorizing the defendant company, by a vote of its stockholders, to unite with the Newport and Fall River R. R. Corporation.

The Old Colony and Fall River R. R. Company has commenced to build its extension to the Rhode Island line; and has also entered into an indenture with the Newport and Fall River R. R. Company; whereby the latter company leases its road, when completed, to the former company for a term of ten years, at an annual rent; and the former company agrees to pay in advance the rent for the whole term, to be used for the purpose of building the road of the latter company. This arrangement was sanctioned by a vote of the stockholders.

C. I. Reed, (*E. Ames* with him,) for plaintiff. The question to be

¹ Statement abridged. — ED.

determined in this case is, whether, after a stockholder in a corporation has investigated the scheme stated in the charter, and become satisfied that the enterprise will be safe, and invested his money in it, a majority of the stockholders may against his will change the corporate purposes, either with or without legislative sanction, and apply his funds to the promotion of an enterprise in which he has no faith. This is what *St.* 1861, c. 156, authorizes to be done.

No legislative sanction could give authority to a majority of the partners in a firm, or the members of a voluntary association, to do this, because it would impair the obligation of the contract between the parties. In this respect, a corporation stands on no different ground. *Simpson v. Denison*, 10 Hare, 51. The shares are personal property, and the rights of the shareholder, so far as this case is concerned, do not differ from the rights of a partner. This is a private corporation; as much so as banking corporations which issue currency, or as turnpike or canal corporations. *Dartmouth College v. Woodward*, 4 Wheat. 518. *State Bank of Ohio v. Knoop*, 16 How. (U. S.) 380, 381. Angell & Ames on Corp. § 31, & *seq.* and cases cited. Private corporations have no political privileges. And without legislative sanction, it is plain that a majority of the members of the corporation could not make this change against the will of the minority. Angell & Ames on Corp. §§ 391-393, 537, and cases cited. *Salem Milldam Corp. v. Ropes*, 6 Pick. 32. Before *St.* 1831, c. 81, which provided that all acts of incorporation thereafter passed should be liable to be amended, altered or repealed, at the pleasure of the legislature, a majority could not do this even with legislative sanction. *Boston and Lowell Railroad v. Salem and Lowell Railroad*, 2 Gray, 1, and cases cited. Angell & Ames on Corp. §§ 391, & *seq.* 537. *Crease v. Babcock*, 23 Pick. 334. *Dodge v. Woolsey*, 18 How. (U. S.) 331. *State Bank of Ohio v. Knoop*, 16 How. (U. S.) 369. *Curran v. Arkansas*, 15 How. (U. S.) 304. *Woodruff v. Trapnall*, 10 How. (U. S.) 190. *Planters' Bank v. Sharp*, 6 How. (U. S.) 301. *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 133. *Allen v. McKeen*, 1 Sumner, 276. *McCray v. Junction Railroad*, 9 Indiana, 359. *Stevens v. Rutland & Burlington Railroad*, 29 Verm. 548. This rule has frequently been applied in actions on subscriptions. But may a corporation apply money which has been paid in, to purposes the prosecution of which would prevent them from collecting unpaid assessments? Before that statute was passed, the state could no more authorize this change against the will of the minority than against the will of the majority, or of the whole body. The reason is, because the state could not pass a statute impairing the obligation of contracts. Railroad corporations are within this general rule. If English cases are thought to establish a contrary doctrine, it is to be remembered that in England parliament is omnipotent, and may abrogate contracts between corporations and individuals, and between the nation and individuals. With us it is different. We have written constitutions, which control legislative action. *Fletcher v. Peck*, 6 Cranch, 87. The

English cases hold that a court of chancery will restrain a corporation from using its funds to obtain from parliament an act changing its powers, if a single shareholder objects ; but will not restrain it from making the application, in cases in which the public may be interested. And when a railroad company applies to parliament for an extension of its power, it is now the settled practice, upon the bill of a single stockholder, to enjoin the use of the corporate funds in the prosecution of this object, but to refuse to enjoin the application itself. *Bagshaw v. Eastern, &c. Railway*, 7 Hare, 114. The ground on which the use of the corporate funds is enjoined is, that it would be in violation of the contract between the corporation and the stockholder. See *Lancashire, &c. Railway v. Northwestern Railway*, 2 Kay & Johns. 293, 310, and cases cited. And there is no weight in the objection that this would give one stockholder undue power ; because it is only in the execution of powers derived from their charter that the majority can control the single stockholder. When they undertake to transcend this, or to vary or change the contract, a single individual, clothed with the whole authority of the law, and with its whole enginery at his command, becomes supreme. Then may "one chase a thousand, and two put ten thousand to flight."

Undoubtedly the corporation is bound by the statute, by reason of its assent to it. This would have been the case even before the passage of *St.* 1830, c. 81. But that statute does not authorize the passage of an act like *St.* 1862, c. 149. The *St.* of 1830 was passed because it had become settled law that every act of incorporation was an irrevocable grant ; and thus corporations enjoy privileges not possessed by individuals. The public good frequently required legislation which would be inconsistent with the contracts of the state with corporations, in granting their franchises. This statute, therefore, reserved the power of amendment or repeal to the legislature, for public purposes, in order that the state might change contracts between itself and corporations. But the corporation has made another contract with its stockholders, which it has no right to violate, either without or with the assistance of the legislature. The former contract the state may change. It may impose new restrictions ; order the corporation to sound whistles, erect gates, make bridges, station flagmen, change the grade of the road at crossings, &c. And it may do these things against the consent of a minority, or a majority, or the whole body of the stockholders. The right does not depend at all upon their assent. But this does not give the state the power to make a change which will impair contracts made by corporations with third persons ; nor does it give to corporations the right to violate such contracts. See *Commonwealth v. Essex Co.* 13 Gray, 239 ; *Hamilton Ins. Co. v. Hobart*, 2 Gray, 547. The statute was not intended to touch such cases.

Inasmuch as the object of the statute was to authorize the legislature to make certain changes, as above described, against the will of corporations, the latter may be compelled to comply with the requirements of

the legislature, whether they will or not. But it is plain that the legislature could not compel the Old Colony and Fall River Railroad Company to build this new line of road. They might have done so at the time the charter was granted, as a condition of the grant; but they cannot do so now, because it would impair the rights acquired by the corporation and its stockholders. The same reason exists why the minority should not be so compelled.

The *St.* of 1830 is a mere reservation of authority by the state, and not the creation of a power. It was not intended to give to majorities in corporations any larger control over the minority, or in any way to affect the relations existing between a corporation and its stockholders. It confers upon the state no authority over corporations and their stockholders, which it did not always possess over citizens. Otherwise, its effect would be, in the present case, to import new terms into the contract; to devote the property of the stockholders to new purposes, aside from the contract; to make them partners in a new enterprise; to make the corporation liable for new debts; and to admit to the control and management of its affairs new members, against the plaintiff's will.

Before the passage of *St.* 1830, neither the legislature nor a corporation, nor both together, possessed the power of changing the purposes for which a corporation was created, against the will of a minority of the stockholders. How then could these two parties, neither of whom possessed this power, confer it upon one of them? Nor can it be maintained that this statute, construed in connection with any charter granted since its passage, constitutes a contract that the state may make any law which it pleases touching it. This is the ground of cases in New York. But the provisions of the constitution, which restrain the enactment of laws impairing the obligation of contracts, also enter as elements into the contract; and thus read, the statute means that the state may make any law which is constitutional. It only gave to the legislature authority to make such changes as would simply enlarge or diminish the privileges or restrictions set out in the charter and the statutes; but it gave no power to change the purposes for which a company was incorporated, against the assent of any of its members.

The borrowing of money and issuing of bonds by the defendant corporation were unauthorized. *St.* 1861, c. 156, § 2. Gen. Sts. c. 63, § 120. The contract with the Newport and Fall River Railroad Company was also illegal. It was a mere evasion of the statute, to enter into such a contract with a moonshine corporation, and call it a lease.

S. Bartlett and J. G. Abbott, (B. Dean with them,) for defendants.
[Argument omitted.]

J. H. Clifford, replied for plaintiff.

BIGELOW, C. J. We do not deem it necessary to consider the questions raised by the demurrer to the bill, nor to discuss the nature or extent of the jurisdiction of this court in equity over corporations, at the suit of one or more of their stockholders, in cases where there has been an excess or abuse of the power or authority conferred by legisla-

tive grants. In the view which we have taken of the merits of the case, these questions become immaterial.

The case for the plaintiff mainly rests on the single proposition of law, that a corporation established by the legislature of this commonwealth, by acts which, under *St.* 1830, *c.* 81, are subject to alteration, amendment or repeal, at the pleasure of the legislature, cannot engage in any new enterprise or enter upon any new undertaking, in addition to that contemplated by and embraced in the original charter of the company, against the consent of any one of its stockholders, although such new enterprise or undertaking is of the same kind with that for which the corporation was originally established, and is authorized, sanctioned and adopted by an express legislative grant, and by a vote of the majority of the stockholders duly ascertained according to law.

In endeavoring to ascertain whether this proposition can be supported on sound legal principles, it does not seem to us to be necessary to enter upon any extended discussion of the extent of the right reserved by the general laws to the legislature to modify or repeal the charters of corporations without or against their consent. No question arises here between the legislature and the corporation. The latter have assented, in the mode provided by law, to the change in their rights, powers and duties which have been created by the act set forth in the bill, and have thereby accepted the modifications of their original contract with the Commonwealth, which result from the new provisions of law which they have thus adopted and sanctioned. Nor are we called on to determine the effect which such a legislative act would have upon a previously existing executory contract entered into with the corporation; as, for instance, an agreement to subscribe for stock and to become a member of a corporate body, created or to be established for certain distinct and designated objects. No such question arises in the present case. The plaintiff had no executory agreement with the defendants at the time the act in question was passed by the legislature, or when it was approved and accepted by a legal vote of the corporation. He was then the absolute owner of shares, and as such was a constituent member of the body corporate, clothed with all the rights and privileges and subject to all the duties and obligations of a stockholder. These, therefore, constituted the extent and the measure of his responsibility to the corporation, and of their liability and legal obligations to him. In this view, the gist of the present inquiry seems to us to embrace a much narrower range than that which was taken in the very elaborate and extended argument submitted by the learned counsel for the plaintiff. It appears to us that when we shall have ascertained and defined with precision and accuracy the nature of the contract which subsists, under the statutes of this commonwealth, between a corporation and one of its members, solely by virtue of his being a proprietor of shares in the capital stock, we shall have gone very far towards a final adjudication of the rights of the respective parties, so far as they are involved in the present controversy.

We suppose it may be stated as an indisputable proposition, that every person who becomes a member of a corporation aggregate by purchasing and holding shares agrees by necessary implication that he will be bound by all acts and proceedings, within the scope of the powers and authority conferred by the charter, which shall be adopted or sanctioned by a vote of the majority of the corporation, duly taken and ascertained according to law. This is the unavoidable result of the fundamental principle that the majority of the stockholders can regulate and control the lawful exercise of the powers conferred on a corporation by its charter. A holder of shares in an incorporated body, so far as his individual rights and interests may be involved in the doings of the corporation, acting within the legitimate sphere of its corporate power, has no other legal control over them than that which he can exercise by his single vote in the meetings of the company. To this extent, he has parted with his personal right or privilege to regulate the disposition of that portion of his property which he has invested in the capital stock of the corporation, and surrendered it to the will of a majority of his fellow corporators. The *jus disponendi* is vested in them so long as they keep within the line of the general purpose and object for which the corporation was established, although their action may be against the will of a minority, however large. It cannot, therefore, be justly said that the contract, express or implied, between the corporation and the stockholders is infringed or impaired by any act or proceeding of the former which is authorized by a majority, and which comes within the terms of the original statute creating and establishing their franchise, and conferring on them capacity to exercise control over the rights and property of their members. On the contrary, the fair and reasonable implication resulting from the legal relation of the stockholder and the corporation is, that the majority may do any act either coming within the scope of the corporate authority, or which is consistent with the terms and conditions of the original charter, without and even against the consent of an individual member.

Such being the nature of the contract which subsists between the corporation and each of its members, we have only to inquire, in the present case, whether it has been in any respect violated by the present defendants. The answer to this inquiry will be found in the interpretation which is put on that clause of the general laws of this commonwealth already cited, by which a right is reserved to the legislature to amend, alter or repeal any act of incorporation which has been established by its authority since the enactment of that provision in *St.* 1830. Whatever may be the extent of the authority which is thereby retained by the legislature to modify or change the charters of corporations without or against their consent, there would seem to be no reason to doubt that, with the concurrence of the corporation manifested in the mode pointed out by law, the legislature may make any alteration in or addition to the power and authority conferred by the original act of incorporation, and not foreign to the purposes and objects for which it

was enacted, and which it was designed to accomplish, which may seem to be expedient or necessary. No breach of contract would be thereby occasioned. Such action would be in precise accordance with the terms on which the grant of the franchise was made. In creating a corporation, no contract is made by the legislature with the individual members or stockholders, any further than they are represented by the artificial body which the act of incorporation calls into being. They have no other rights except those which exist or grow out of the constitution of the body corporate of which they are members. To this only can we look, in order to ascertain whether there has been any breach of contract or violation of chartered rights. It constitutes, of itself, the contract by which the rights of all parties are to be governed. When, therefore, it is expressly provided between the legislature on the one hand and the corporation on the other, as part of the original contract of incorporation, that the former may change or modify or abrogate it or any portion of it, it cannot be said that any contract is broken or infringed when the power thus reserved is exercised with the consent of the artificial body of whose original creation and existence such reservation formed an essential part. The stockholder cannot say that he became a member of the corporation on the faith of an agreement made by the legislature with the corporation, that the original act of incorporation should undergo no change except with his assent. Such a position might be asserted with more plausibility, if there was an absence of a clause in the original act of incorporation providing for an alteration in its terms. In such a case it might perhaps be maintained that there was a strong implication that the charter should remain inviolate, and that the holders of shares invested their property in the corporation relying upon a contract entered into between it and the legislature that the provisions of the act creating it should remain unchanged. But it is difficult to see how such a construction can be put on a contract which contains an express stipulation that it shall be subject to amendment and alteration. If it be asked by whom such amendment or alteration is to be made, the answer is obvious: by the parties to the contract, the legislature on the one hand and the corporation on the other; the former expressing its intention by means of a legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter. It is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the assent of the other contracting party. In such case, all persons claiming derivative rights or interests under the original contract, with notice of its terms, would be bound by the amendment or alteration to which the parties should agree. Take an illustration, similar to one put by the learned counsel for the defendants. Suppose a copartnership or joint stock company, consisting of ship-owners, to be formed for a specific purpose, to carry on, for instance, a series of voyages to India, with a proviso that at any time, by mutual assent of the parties, the terms of the original agreement might be

modified or changed; it being also stipulated that owners of merchandise might share in the contemplated enterprise by sending goods to the ports or places to which the ships might be sent in pursuance of the agreement. Can there be any doubt that under such a contract the shipper of goods would be bound by any alteration in its terms to which the original parties should agree, and that if, in pursuance of such alteration, the destination of their vessels should be afterwards changed by the owners, so that voyages to China were substituted instead of to India, this change in the terms of the agreement would constitute no breach of contract towards the shippers of goods? If it be not so, then it would follow that a sub-contractor would not be bound by a stipulation in the principal contract under which he undertook to act, and of which he had due notice. It is a mistake, therefore, to say that the contract of a stockholder with a corporation established under our statutes binds the latter to undertake no new enterprise and engage in no business or operation other than that contemplated by the original charter. This interpretation puts aside the express provision authorizing an amendment or alteration of the act of incorporation, and gives it no effect as against a stockholder without his assent, although he bought his stock or subscribed for his shares subject to the legal effect of such a stipulation. The infirmity of the argument in behalf of the plaintiff is, that it admits that an amendment may be legal and valid as to the corporation, if they assent to it by a vote of the majority, while at the same time it sets it aside as against the stockholder who refuses to sanction it, on the ground that as to him it is illegal and void. But we cannot see how the amendment can be said to be legal and illegal *uno et eodem flatu*. If it is valid as to the corporation, for the reason that they have accepted and approved it according to the provisions of their charter, it would seem that it must also be binding on the stockholder, who has agreed that his rights and interests in the corporation shall be regulated and controlled by a vote of a majority, acting in conformity to the original constitution of the corporation, and within the scope of its corporate powers. The real contract into which the stockholder enters with the corporation is, that he agrees to become a member of an artificial body which is created and has its existence by virtue of a contract with the legislature, which may be amended or changed with the consent of the company, ascertained and declared in the mode pointed out by law. Having, by virtue of the relation which subsists between himself and the corporation as a holder of shares, assented to the terms of the original act of incorporation, he cannot be heard to say that he will not be bound by a vote of the majority of the stockholders accepting an amendment or alterations of the charter made in pursuance of an express authority reserved to the legislature, and which by such acceptance has become binding on the corporation. Such we understand to be the result of the adjudicated cases. In *Crease v. Babcock*, 23 Pick. 342, it was expressly decided that corporations, by accepting a charter, directly agree to adopt the provision

reserving to the legislature the right to amend, alter or repeal the act of incorporation as a constituent part of their contract; and it has often been decided, under similar provisions in the statutes of other states, that amendments or changes, either abridging the corporate authority or enlarging and extending it so as to embrace new enterprises and to incur additional burdens and liabilities, when duly adopted by the corporation, are valid and binding on a dissenting minority, as well as on those corporators by whose votes the amending act has been accepted and approved. *Buffalo, &c. Railroad v. Dudley*, 4 Kernan, 336, 348, 354. *Northern Railroad v. Miller*, 10 Barb. 282. *Meadow Dam Co. v. Gray*, 30 Maine, 547. *Oldtown, &c. Railroad v. Veazie*, 39 Maine, 580. *Banet v. Alton, &c. Railroad*, 13 Illinois, 504.

It was urged, as a grave objection against the doctrine above stated, that it puts the minority of the stockholders of a corporation entirely within the control of the legislature and a majority of the stockholders, and that there would be no limit or restraint placed on the exercise of the power, so that corporations might be diverted to purposes and objects wholly foreign to those for which they were originally established, and stockholders might be made to participate against their will in undertakings which they never contemplated and which they deemed inexpedient or ruinous. If this be so, it is a consequence of which no stockholder can reasonably complain, because it is a result which flows from the contract into which he has voluntarily entered. But we are not prepared to admit the soundness of the objection. A restraint or limit on the power of the legislature to alter or amend a charter, even with the consent of the corporation, may perhaps be found in the doctrine recognized in some of the English cases, that the enlargement of corporate powers shall not be extended so as to authorize enterprises or operations different in their nature and kind from those comprehended within the terms of the original charter, but shall be confined to purposes and objects *ejusdem generis* with those for which the corporation was primarily granted. See *Ware v. Grand Junction Water Works*, 2 Russ. & Mylne, 470; *Ffooks v. Southwestern Railway*, 1 Sm. & Gif. 142. But however this may be, no such question arises in the present case, inasmuch as the additional acts, the validity of which is called into controversy by the plaintiff, do not empower the defendants to engage in any undertaking essentially different in kind from that which was embraced in the original acts by which their corporate existence under their present name was authorized and established.

So far as any argument against the right of the legislature to amend or alter the charters of corporations under our statutes is drawn from the peril to which it exposes the property and interests of dissenting minorities of stockholders, we cannot deem it of any practical weight or importance. The good faith of the legislature and the self-interest of the majority will ordinarily be a sufficient protection against any wanton or oppressive use of their power. Against any dishonest or fraudulent abuses of it, a sufficient remedy can always be had in the courts of justice.

It may be well to add, in order to avoid misapprehension, that we do not intend to say that the legislature have any power to change or modify an act of incorporation in such a way as to affect in a material particular a contract which they have entered into with a third person. Such an exercise of legislative power would be unconstitutional and invalid, because it would impair the obligation of a contract. It was so decided by this court in *Hamilton Ins. Co. v. Hobart*, 2 Gray, 547, where it was held that an act of the legislature was void which made a new party to an executory contract of insurance without the assent of the assured. All that we mean to determine is, that the obligation of the contract which subsists between the corporation and a stockholder, by virtue of his being a proprietor of shares in the corporate stock, is not impaired by an act of the legislature which amends and alters the charter and authorizes the corporation to undertake new and additional enterprises of a nature similar to those embraced within the original grant of power, if such act is accepted by a majority of the stockholders in the mode provided by law.

The only other ground on which the plaintiff seeks to maintain his bill is, that the indenture entered into by the defendants with the Newport and Fall River Railroad Company, for the lease of the road belonging to the latter company to the defendants, is a violation of the second section of the act of 1861, authorizing the extension of the defendants' road, which prohibits them from using any part of their reserved funds to build said extension or any portion of the road in Rhode Island. But on looking at the terms of the instrument it appears to us to be a lease in regular form for a term of ten years of the road in Rhode Island to the defendants, in consideration of a stipulated rent *per annum*, payable in advance, and of an agreement by the defendants to perform all the transportation of persons and freight upon and over the road in Rhode Island. Such a contract seems to us to be fully authorized by Gen. Sts. c. 63, § 115; and there being no allegation or proof that it was made collusively, for the purpose of evading the prohibition of the expenditure of the surplus or reserved funds belonging to the defendants, or that such will be the effect of carrying out the stipulations in the indenture, we are of opinion that the plaintiff fails to support this part of his case.

Bill dismissed.

ZABRISKIE v. HACKENSACK AND N. Y. R. CO.

1867. 18 *New Jersey Equity* (3 *C. E. Green*), 178.¹

THIS case was argued upon a rule to show cause why the defendants should not be enjoined from mortgaging the property of the company, or from expending its funds in the construction of a road not authorized by their charter, but being an extension of the original road, authorized by a supplement to their charter.

C. H. Voorhis, for complainant.

Knapp, and *Hopper*, for defendants.

ZABRISKIE, CHANCELLOR. The Hackensack and New York Railroad Company was incorporated in 1856, with power to construct a railroad from Hackensack to the Paterson and Hudson River Railroad, with a capital stock of two hundred thousand dollars, and with power to mortgage its road and lands, franchises and appurtenances, to the amount of fifty thousand dollars. Under this act, it laid out, located, and built a road five miles in length, terminating at Essex street, in Hackensack, within one mile of the court-house, as required by the charter. It borrowed thirty thousand dollars, for which it gave a mortgage upon the road and its equipment, franchises, and other property. By a supplement to this charter, passed March 12th, 1861, it was authorized to extend the road northwardly to Nanent, on the Erie railway, in the state of New York, a distance of about twelve miles, to increase the capital stock to any extent required, and to issue bonds to the amount of two hundred and fifty thousand dollars, which, in the words of the act, were "for the construction and equipment of the road to be constructed under this act, and to secure the payment of said bonds, the said company shall have power to mortgage the said road, with its franchises and chartered rights."

In 1861, the company extended its road under this supplement to a point on Passaic street, in the village of Hackensack, more than a mile from the court-house, the length of the extension being about a mile. After this, it executed a new mortgage upon the whole road, as extended, and its equipments, and its franchises and chartered rights, to secure the payment of ten thousand dollars. No new stock was issued for this extension.

The company has recently, under the supplement of 1861, laid out and located another extension for about a mile and a half north of the present terminus, reaching from Hackensack to New Bridge, and has made contracts for the construction of it, and has, by resolution, determined to make a new mortgage to cover the whole road, as it will be when finished to New Bridge, with its equipments and appurten-

¹ Argument and part of opinion omitted. — Ed.

ances, and the chartered rights and franchises of the company, to secure one hundred bonds of one thousand dollars each, for the purpose of paying off the two mortgages which are now on the road; for relaying with new rails and ties the road first built, and furnishing it with the necessary equipment, which is now deficient for its business; and for constructing and equipping the extension to New Bridge.

The complainant is a stockholder in the company; and of nine hundred and thirty shares of capital stock issued, for one hundred dollars each, he owns three hundred and twenty-four. He applies for an injunction to restrain the defendants from constructing the extension to New Bridge, and from executing the mortgage proposed.

He opposes the extension, on the ground that it is a different enterprise from that for which his stock was taken, and the money paid, and that neither the directors, nor a majority of the stockholders, can compel him to embark his capital in any undertaking but the one for which it was subscribed and paid.

[The learned Judge *held*, that the extension to Nanent, authorized by the act of 1861, had not been assented to by a majority of the stockholders.]

The extension authorized by the act of 1861, is a radical change in the object of this corporation; it is an enterprise entirely different from that in the charter. That was to construct and operate a railroad from Hackensack to the Paterson railroad, at Boiling Spring, an easy and almost direct route to New York; it was from a thriving village, the county town of Bergen county, over a level country, and only five miles in length, as shown by the return of its location. The extension would be about twelve miles in length, through an uneven country, mostly, if not wholly, agricultural; with no village, except the very small one at New Bridge, on its route; and it runs into the state of New York some distance, and terminates at a point on that part of the Erie railway which the company have abandoned for regular traffic, and on which few trains are run. It is an entirely different enterprise.

The question here is, can this company, either with or without the consent of a majority in interest, of its stockholders, compel the complainant to embark capital subscribed for the first enterprise, in this new one, entirely different.

Since the Dartmouth College case, in the Supreme Court of the United States, the doctrine has been considered firmly established, and been confirmed by repeated decisions, both in that court and the state courts, that a charter, granted by the legislature to a corporation, is a contract between the state and the corporators, and that the state can pass no act to take away or impair any of the franchises or privileges granted by it. The company, or artificial person thus created, and its property, is subject to all general laws and police regulations made by the legislature after such grant, in the same manner as natural persons and their property are; provided they are not such as to take away or impair any of the franchises plainly granted by the charter. This doc-

trine did not prevent the legislature from conferring new privileges upon any corporation, to be accepted at its own election.

It is also settled, upon the principles of the common law, in this state, and most of the states of the Union, that when a number of persons associate themselves as partners, for a business and time specified in the agreement between them, or become members of a corporation for definite purposes and objects specified in their charter, which in such case is their contract, and for a time settled by it, that the objects and business of the partnership or corporation cannot be changed, or abandoned, or sold out, within the time specified, without the consent of all the partners or corporators; one partner or corporator, however small his interest, can prevent it. And this is so, although by law a majority in either case can control or manage the business against the will and interest of the minority, so long as it is within the scope of the partnership or charter.

This rule is founded on principle, the great principle of protecting every man and his property by contracts entered into, a guiding principle in all right legislation, and incorporated into the constitution of the United States, and of almost every state in the Union. And the rule is not changed because the new business or enterprise proposed is allowed by law, or has been made lawful since the association was formed.

[After referring to *Natusch v. Irving*, to *Kean v. Johnson*, 1 Stockton, N. J. 401, and other cases, the opinion proceeds:]

After the effect of the rule established in the Dartmouth College case began to be felt in the states, it was found that by the numerous acts of incorporation, freely and perhaps necessarily granted, great inconveniences resulted, and that provisions incautiously inserted, too much restricted the power of future legislatures; and that the laws, which experience showed were necessary to govern corporations in the exercise of their powers, could not be passed. And the legislature of many states, by degrees and successively, adopted the practice of inserting in acts granting franchises, that they might alter, modify, or repeal the act; and also, by general law, provided that all acts of incorporation thereafter passed, should be subject to such alteration and repeal.

The provision is contained in the general act of this state, passed in 1846, (*Nix. Dig.* 152, § 6.)¹ that such charters should be subject to alteration, suspension, and repeal, in the discretion of the legislature. This and all similar special and general provisions were intended for the purpose specified; to give to the legislature the clear right, at their pleasure, to alter or repeal the acts of incorporation. The state, without this, could have done it with the assent of the corporators. They could give them property; they could add to their powers or privileges. But they could not take away any power, privilege, or franchise, conferred by the act, nor compel them to exercise any new power or franchise conferred.

¹ *Rev. p.* 178, § 6.

Besides this general law of the state, the charter of the defendants contains this provision, that "the legislature may, at any time, alter, modify, or repeal the same."

The object and purpose of these provisions are so plain, and so plainly expressed in the words, that it seems strange that any doubt could be raised concerning it. It was a reservation to the state, for the benefit of the public, to be exercised by the state only. The state was making what had been decided to be a contract, and it reserved the power of change, by altering, modifying, or repealing the contract. Neither the words nor the circumstances, nor apparent objects for which this provision was made, can, by any fair construction, extend it to giving a power to one part of the corporators as against the other, which they did not have before.

It was to avoid the rule in the Dartmouth College case, not that in *Natusch v. Irving*, that the change was made. The words limit the power to that object.

On general principles, and the settled rules of construction, I would hold this to be the effect, and only effect, of the provision in the general act and in the charter of the defendants, without any hesitation, were it not for a series of decisions by most respectable courts, which hold that this provision obviates the effect of the rule in *Natusch v. Irving*, and *Kean v. Johnson*, and enables a majority of the corporators in all charters subject to a like provision, to change, by legislative permission, and within certain limits, the object and purpose of the corporation. They hold that the contract between associate corporators, that they will confine their business to life insurance, is changed by legislative permission to engage in marine insurance, or a contract to join in constructing a railroad from New York to Newark, can be changed to one from New York to Elizabeth by legislative consent. The reasoning is founded on the fact that the subscription for the stock, which is the contract, was made as in this case under a charter which authorizes a road from the Paterson road to Hackensack, and authorizes the legislature to alter and modify the act. And from this they infer that it is a contract to join in building any road that the legislature may, by such alteration, authorize the company to build; and that such authority, or additional privilege, may be accepted by a majority of the corporators.

So far as the alteration is made by the legislature, in a way to be compulsory on the corporation, this is correct; as, if they should require the company to build a double track, or widen the draws in a bridge, or exact less fare or toll; these would be within the contract, or would be annexed to it as a condition, and every stockholder would take his stock subject to the contingency of such alteration.

But if the change in the act is simply offering the corporation the privilege of entering upon another and a different enterprise, it is not within the condition to the subscription. The only construction to be given is, that the legislature may alter, not that the stockholders may,

as between each other. The case of *Natusch v. Irving* was decided upon this very ground. The act of Parliament had given the company *the power* to embark in marine insurance, but the consent of all the parties was still held necessary. The plain object of the reservation in this case was to give the legislature, not a bare majority of the stockholders, power.

This view of the case is so clear upon principle that I feel constrained to be guided by it, although the weight of the decisions in other states is against it.

In the case of the *Oldtown and Lincoln R. Co. v. Veasie*, 39 *Maine R.* 571, the act of incorporation, passed March 8th, 1852, authorized not less than eleven thousand, nor more than fifteen thousand shares. Veasie, August 13th, 1852, subscribed for one thousand shares; only nine thousand five hundred shares were subscribed. A supplement, passed September, 1853, under the power reserved to alter, fixed the capital at not less than eight thousand, nor more than twenty-five thousand shares. This was accepted by the directors. Veasie was sued for his subscription, and objected on the ground that until the supplement was passed, the number of shares required to constitute the company not having been subscribed, he could not be sued for his subscription, and that the legislature under the power reserved, although they might alter the charter, could not affect the rights of the stockholders between themselves, or change their contract with the company.

The court held that he was not liable under the original act, to be sued until eleven thousand shares were subscribed for, and that the power to amend did not authorize a change in the rights or liabilities of the corporators between themselves.

Chief Justice Shepley says (p. 580): "The legislature might as well have attempted to alter a contract between the corporation and one of its members respecting the construction of the road, as a contract respecting any part of its capital. If a corporation, being party to a contract with one of its corporators, might, by the assistance of the legislature, absolve itself from the performance of any part of the contract, it might from the whole, and might require payment of the money subscribed, without allowing the subscriber to derive any benefit from it. It is the charter only, and the rights and liabilities of the corporators as such in consequence thereof, that can be varied by an act of the legislature, and not the private contracts made between the corporation as one party, and its corporators as the other."

Now in this case, the private contract between the stockholders and the corporation, or between them mutually, on subscribing for the stock, was that their enterprise was the road from the Paterson railroad to Hackensack, and the power reserved was not to authorize any of the parties to this private contract, at their pleasure, to violate it. The supplement of 1861 does not *require* the extension to be built; it only authorizes it at the option of the corporation. The words are,

"it shall be lawful for said company to extend their railroad." And it is held in England, where the courts by mandamus compel a company to construct the road it is incorporated to construct, that an act giving the privilege of extension is not obligatory on the company, and the mandamus is in such case refused, *York and Midland R. Co. v. Regina*, 1 *Ellis & Bl.* 858; in which the Exchequer Chamber reversed the decision of the Common Bench, in 1 *Ellis & Bl.* 178, in the same case.

In New York a different rule has been established, and it is held that the power to alter will authorize the company, by consent of the legislature, to extend its enterprise without the consent of the stockholders.

[Here the learned Chancellor cited, and commented upon, various New York cases.]

The Supreme Court of Massachusetts has followed the decisions in New York, and in the well considered and well argued case of *Durfee v. The Old Colony R. Co.*, 5 *Allen* 230, arrived at the conclusion that the reserved right to alter and repeal authorized a company to engage in a new enterprise, without the consent of all the shareholders. The reasoning of the able counsel who combated this position contains the best exposition of the law that I have found anywhere. The reasoning of Chief Justice Bigelow, in delivering the opinion of the court, does not convince me. He places the decision upon principles not acknowledged in this state, and relies upon the two cases in Maine, cited above, as well as those in New York, as supporting his view. He assumes (on p. 244.) that it is the object of the provision, that an amendment may be made by the consent of *both parties*, the legislature on the one side, and the corporation on the other; the former expressing its assent by a legislative act, and the latter by a vote of the majority of stockholders; and observes "that it is nothing more than the *ordinary* case of a stipulation that one of the parties to a contract may vary its terms, with the consent of the other contracting party."

Now in this state it is settled that an alteration made by the legislature, under this reserved power, is valid and binding, without the consent, and against the will of the corporation, and all its members. The two decisions in the Court of Errors, not yet reported,¹ upon the charters of the Morris and Essex Railroad Company, and of the Jersey City and Bergen Railroad Company, settle that the legislature may, against the will of the companies, change the mode of taxation prescribed in their charter for one more burthensome.

And the rule of the common law as to contracts, adopted here, gives the power to the parties, where both assent, to alter any contract without the stipulation for that purpose, which would seem from the language of the opinion, to be *ordinarily* inserted for it in Massachusetts. Such stipulation is seldom or never made in New Jersey.

This view, that the object of the reserved power was to give the

¹ Since reported in 2 *Vr.* 521; *Id.* 575.

majority of the corporators the power to control the minority, with the consent of the legislature, has never been adopted in this state. The act of Massachusetts, *Statutes* 1831, *ch. LXXXI*, to which reference is made, contains no provision as to consent of the stockholders, but is a pure, simple reservation of power, like the act of New Jersey.

The decisions in the cases of *Banet v. Alton and Sang. R. Co.*, 13 Ill. 504, *The Pacific Railroad v. Renshaw*, 18 Missouri 210, *The Pacific Railroad v. Hughes*, 22 Missouri 291, hold that the majority of the stockholders, by authority of the legislature, may make a change, provided it is not great or a radical one. They, in express terms, say that a change like this would not be warranted, and so far as of authority, are on the side of the complainant.

But the principle on which they are decided is wrong; and if it is once conceded that a majority of the corporators may, by authority from the legislature, change the object of the enterprise in small things, there is no principle of law by which they can be restrained in any a little larger, or in the character of the whole work. The same principle will lead the courts of Illinois and Missouri, as it did those in New York, to allow radical changes, and must, if consistently applied, allow a charter for a railroad to be used for banking or insurance business, or for a canal, theatre, brewery, or beer saloon.

There is no other alternative to the proposition, that while the power reserved authorizes the legislature, within certain limits, to make such alterations as they choose to impose, it gives no authority, when the legislature does not impose them, for the majority to adopt such alterations or enter upon such enterprises as are allowed by the legislature.

Again, the power of the legislature has its limits. It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one, and oblige the stockholders to accept it. It can alter or modify the old one; but power to alter or modify anything can never be held to imply a power to substitute a thing entirely different. It is not the meaning of the words in their usually received sense. Power to alter a mansion-house would never be construed to mean a power to tear down all but the back kitchen and front piazza, and build one three times as large in its place. In anything altered, something must be preserved to keep up its identity; and a matter of the same kind, wholly or chiefly new, substituted for another, is not an alteration; it is a change.

In some cases there might be room for doubts, but in this case there can be no hesitation in saying that a railroad of seventeen miles from the Paterson road to Nanent, is a change and substitution of one work for another, and not an alteration of the road to Hackensack. They are substantially two different enterprises.

Again, the power is to alter or modify the act, and the true construction of this I hold to be, an alteration of something contained in or granted by the act. Any of the franchises granted may be altered; the right to take land by condemnation, the right to take tolls or fare,

or the amount to be taken. But the legislature had no right to impose upon the company any other duty, or anything involving any other duty, than that attending the building a railroad from the Paterson road to Hackensack; anything in the manner of doing that they had a right to change. They could not oblige it to dam and drain all the meadows along the Hackensack, or to construct a canal, or to build a road from Hoboken to Newark, nor could they oblige it to extend its road to Nanent. They could as well oblige it to run to the Pacific. We must keep in mind that by the decisions in New Jersey the company need not accept the alterations; they are bound by them without acceptance if within the power reserved.

By a wider construction of this power any of the main lines of railroad running through the state, incorporated since 1846, or by an act which has in it the power of alteration, may be compelled to build and run a branch to any village or place near that route, that the legislature may direct. It must be held that the power to alter and modify does not give power to make any substantial additions to the work.

Again, the act of 1861 does not, in fact, alter or modify the act of 1856 in any one thing embraced in it. That act, and every power and franchise granted by it, and any duty it imposed, remains the same. And the defendants can now go on under it precisely as if the supplement had not been passed. The company is authorized to construct another road; it is not compelled to do it. If it builds it, or if it does not, its old charter remains with all its franchises and privileges intact, and no new burthens imposed, except so far as it assumes them. This is in no sense of the word an alteration of the charter. It would be as absurd to say that an owner had *altered* his house, who had built a larger one on an adjoining lot. And until the legislature have made a valid alteration of the charter, the rights of each stockholder are as held in *Kean v. Johnson*; he can prevent all the others from changing or abandoning the work.

The supplement of 1861 is a perfectly valid and constitutional act. It is a grant of privileges that the legislature have a right to grant, as they could grant to this corporation the right to conduct banking or insurance business, or to run a ferry across the North river; but the company is restrained by the law of corporations and partnerships, from expending the money or using the credit of the corporation in such enterprises, unless every shareholder consents.

The extension to Passaic street, both because it comes within the grant in the charter, and more especially because every shareholder must be held to have consented to it by acquiescing in its construction and maintenance for years, must be decided to be lawful.

The defendants must be restrained from extending the road beyond its present terminus at Passaic street, and from expending any money of the company to pay for any such extension, or from giving any mortgage for the cost of such extension.

There is no foundation for an injunction against a mortgage for any

lawful object, on either part of the road. There is great doubt whether a mortgage on either of the two parts of the road heretofore constructed, for the cost of the other, would pass the franchises of the company in such mortgaged part, but it would be valid as to the property other than franchises, which the company can mortgage without any special power. And besides, the bonds of the company, or its lawful contracts, would entitle the holder to recover upon them, and under the judgment, by the act of 1858, (*Nix. Dig.* 719,¹) the whole road and franchises could be sold. The complainant, therefore, cannot be injured by a mortgage, whether valid or not, upon any part of the road.

ASHUELOT R. R. CO. v. ELLIOT.

1873. 52 *New Hampshire*, 387.

1878. 58 *New Hampshire*, 451.²

BILL IN EQUITY, by railroad corporation and certain stockholders, to redeem mortgages executed by the corporation, in 1851 and 1855, to Elliot as trustee for bondholders. The plaintiffs claimed the right to redeem by paying the bonds. The defendant denied the existence of the right to redeem.

In Feb., 1861, peaceable possession of the road was (in accordance with a vote of the company) given to Elliot as trustee, and he has ever since managed it, and received its entire income; but he has never published the notice required by Gen. Stats. Ch. 122, Sect. 14.

During the same month of February, 1861, in accordance with a vote of the stockholders, a lease of the road was executed to the Cheshire Railroad.

July 4, 1861, the legislature passed an act, the first section of which provides that said mortgages, and all votes of the company in relation thereto and in relation to giving possession to the trustee, are confirmed.

Section 2 is as follows:

“SEC. 2. *Be it further enacted*, That in case said mortgages be not paid or discharged within one year from the passage of this act, William Haile and all other owners of the bonds aforesaid, or their successors, are hereby made the perpetual assigns and substitutes of said Ashuelot Railroad Company, with power to do any and all things as fully and completely as said company could have done before its insolvency, it

¹ *Rev.*, p. 945.

² Statement abridged. Portions of opinions omitted. The greater part of the argument is omitted.—ED.

being the intent and meaning of this act to transfer the corporate powers and duties of said company from the stockholders to the creditors of the same, in perfection and satisfaction of the mortgages above described and said company's votes in relation thereto.

"And it is also provided, that the bonds aforesaid shall hereafter be held and accounted as the sole paid up shares of the Ashuelot Railroad Company, and shall constitute its entire capital, and the owners of the same shall be entitled to share certificates respectively upon the surrender of their bonds aforesaid, subject to the laws of this State."

July 6, 1866, an act was passed authorizing Elliot, as trustee, to sell the mortgaged property at public auction; and providing that upon such sale and conveyance the railroad, &c., "shall become and be invested in the purchaser."

Cushing, for defendant. I. The acts of the State of New Hampshire, of July 4, 1861, and July 6, 1866, have at least this effect: they give the sanction of the legislature to the mortgages, to the entry for condition broken, and to the foreclosing of the mortgage. Section second of the act of 1861 substantially enacts that the mortgage shall be foreclosed in one year from its passage, and also makes provision for a new corporation to take the place of the old one. The act of 1866 goes upon the ground that the mortgage is foreclosed, and, in providing for the sale, provides that all the proceeds and all the property of every kind held in trust by the trustee shall be paid over to the bondholders, thus treating them as the absolute owners, and entirely ignoring any right of the corporation to redeem. In so far as the franchise to be a corporation is concerned, and which it is said cannot be a subject of sale and transfer except by some positive provision of law, provision is made in the first of these acts for its transfer to the bondholders, and by the second for its transfer to the purchaser, whether the Cheshire Railroad or otherwise. So far, therefore, as the authority of the State is concerned, the mortgage and its complete foreclosure are fully recognized and legalized by these acts. *Hall v. Sullivan Railway* cited 2 Redfield on Railways 465, ed. of 1869.

[Remainder of argument omitted.]

Perley, for plaintiffs. The mortgage is not foreclosed.

I. It is not foreclosed under the general laws of the State. Elliot has not entered under process, nor taken peaceable possession, and advertised, as is required, to foreclose a mortgage of real estate; nor has he pursued the course prescribed for the foreclosure of a mortgage of personal estate. In cases where the provisions of the statute prescribe the mode of foreclosure, those provisions govern the foreclosure. In other cases, the supreme court have general equity jurisdiction to foreclose.

II. The mortgage is not foreclosed by or under the private act of July 4, 1861.

1. That act undertakes to foreclose the mortgage by the mere lapse of one year from its passage, without notice of any kind, without a

sale, without requiring possession of the road to be taken and held, and without any bill or other legal process. It is not a legislative, but a judicial act. It is, in substance and effect, a judicial decree, that the mortgage should be foreclosed if the mortgage debt were not paid in one year: and this is exactly the decree that a court of equity would have made on a bill to foreclose the mortgage; for a decree of foreclosure in equity follows the statute in giving one year to redeem, unless there is some reason to vary the general rule. The act is in this respect a clear and flagrant usurpation of the legislative upon the judicial department of the government; is beyond the scope of legislative authority, and in violation of the bill of rights. Bill of Rights, art. 38.

For this reason, — because the act undertakes to decide a particular cause by a new rule not known to the general law of the State, instead of leaving the parties to settle their rights in regular proceedings, according to the general law, — the act is void, and no right can be derived under it. It is not the case where a new remedy is given by a general law. No remedy is provided by which the parties can show and defend their respective rights. It is not a remedy at all, but a decision and final disposition of that particular cause. Neither of the parties can resort to any provision of the act for any hearing or inquiry that could give any remedy under the act. It was a decision, in that individual case, that there was a valid mortgage; that there was a mortgage debt, and a right to redeem; and it was a decree declaring that the mortgage should be foreclosed if the debt were not paid in one year, precisely as if the legislature were a court inquiring into the facts of the case, deciding the legal rights of the parties, and giving a final judgment establishing their rights, and decreeing the manner in which they should be enforced. The authorities are numerous, and, so far as we have seen, unanimous, that, under a constitution like ours, such an act is void, because it is a judicial, not a legislative act. *Merrill v. Sherburne*, 1 N. H. 199-203; *Howard v. Bugbee*, 24 Howard 461; *Routson v. Wolf*, 35 Mo. 174; *Dodge v. Woolsey*, 18 Howard 331; *Goenen v. Schroeder*, 8 Minn. 387; *Denny v. Mattoon*, 2 Allen 361; *Bruffett v. The Railroad, &c.*, 25 Ill. 353; *Cornell v. Hichens*, 11 Wis. 353; *Robinson v. Magee*, 9 Cal. 81; *Dikeman v. Dikeman*, 11 Paige 484; *The People v. Hays and the City of San Francisco*, 4 Cal. 127; *Robinson v. Howe*, 13 Wis. 341; *Pearce v. Patton*, 7 B. Monroe 162; *Dubois v. McLean*, 4 McLean 486; *De Chastellux v. Fairchild*, 15 Pa. St. 18; *Bryson v. Bryson*, 44 Mo. 232; *Orton v. Noonan*, 23 Wis. 102; *Conway v. Cable*, 37 Ill. 82; *Fletcher v. The Rutland Railroad*, 39 Vermont 633. There have been some decisions, of doubtful authority, that the legislature may confirm an equitable title by a private act removing technical and formal objections to the equitable title. But this act, instead of confirming an equitable title, takes away an equitable right, — that is to say, the right in equity of the mortgagors to redeem, according to the law of the State.

2. The act impairs the obligation of the contract between the parties to the mortgage.

Under the mortgage, the railroad had the right to redeem by paying the mortgage debt. This right to redeem would remain until it was barred, according to the terms of the mortgage and the law of the land. It was by the contract in the mortgage that the mortgagors had the right to redeem. The right would belong to them as part of the contract implied in the mortgage, though it had not been secured by the express terms of the mortgage. But the mortgage expressly reserves "to the mortgagors all the rights and privileges of redeeming said property provided by the laws of the State of New Hampshire." By the laws of the State, nothing less can be meant than the *general laws* of the State; not a single private act, taking away the right itself reserved of redeeming according to the laws provided for redeeming mortgages *by the laws* of the State. *Bronson v. Kinzie*, 1 Howard 311; *McCracken v. Hayward*, 2 Howard 608; *Woodruff v. Trapnall*, 10 Howard 190; *Curran v. Arkansas*, 15 Howard 304; *Bruffett v. The Railroad*, 25 Ill. 353; *Cornell v. Hichens*, 11 Wis. 353; *Robinson v. McGee*, 9 Cal. 81.

3. If the legislature had the right to repeal, alter, and amend the act incorporating the railroad, they could not, by the exercise of the right, impair the obligation of a contract, made by or with the road, before the repeal, alteration, or amendment. This contract, made by and with the road, was a valid contract, made under the authority of the State, and the State had no more authority to impair it than a contract made directly by the State herself. The authorities on this point are entirely decisive. *Bruffett v. The Railroad*, 25 Ill. 353; *St. Louis v. Russell*, 9 Mo. 507; *Smith v. Morse*, 2 Cal. 524; *Benson v. The Mayor of New York*, 10 Barb. 223; *Slack v. The Railroad*, 13 B. Monroe 1; *Dodge v. Woolsey*, 18 Howard 331; *Bank v. Debolt*, 18 Howard 380; *Bank v. Thomas*, 18 Howard 384; *Bank v. Skelly*, 1 Black 436; *Van Hoffman v. Quincy*, 4 Wallace, 535; *Hawthorne v. Calef*, 2 Wallace 10; *Conant Van Schaick*, 24 Barb. 87. Here, however, was no repeal, alteration, or amendment of the charter. The act had no more effect on the charter than a judicial decree of foreclosure would have had. The charter, and all the provisions of it, remained exactly as before: no new power was given, nor any power taken away or changed.

4. The act is also in violation of the article in the bill of rights, which declares that "no subject shall be deprived of life, liberty, or estate, but by the judgment of his peers and the law of the land." Bill of Rights, art. 18.

[Remainder of argument omitted.]

Lane (one of plaintiffs) *pro se*.

[Argument omitted.]

DOE, J. I. [The court *held*, that the publication of notice was essential to the foreclosure of a mortgage in the second mode provided

by Gen. Stats. Ch. 122, Sect. 14, which is peaceable entry, one year's possession, and publication of notice. Hence it was decided that the mortgage had not been foreclosed under the general law of the State.]

II. As to a foreclosure, aided or effected by the acts of July 4, 1861, and July 6, 1866, we are not aware that, since the decision of *Merrill v. Sherburne*, 1 N. H. 199, there has been any reason to regard such a point as doubtful in this State. It would be a matter of regret if there could be any uncertainty as to the constitutional law on such a subject. For reasons so clearly and forcibly stated in the plaintiffs' briefs that there is no occasion to enlarge upon them, this bill may be maintained, notwithstanding the acts referred to.

[Remainder of opinion omitted.]

Case discharged.

Subsequently there was a motion for a rehearing. In support of this motion, counsel argued that the acts of 1861 and 1866 were constitutional under the power reserved to the legislature of altering and amending the chartered rights of the Ashuelot Railroad Company. The original charter provides that the legislature "may alter or amend the provisions of this act" for cause assigned, and upon notice to the corporation; "and may repeal this act for a violation thereof."

G. A. Torrey, (*Cushing* and *Faulkner* with him,) in support of the motion.

Lane, for plaintiffs.

DOE, C. J. [After discussing the constitutional provision for the separation of the legislative, executive and judicial powers.]

Nothing having been done by anybody by authority, or in pursuance of the acts of 1861 and 1866 (52 N. H. 390), the Cheshire Railroad Company is not benefited by those acts unless the act of 1861 operated, a year after its passage, as a foreclosure of the mortgage of the railway of the Ashuelot company. And an amendment or repeal of the Ashuelot charter being as plainly a legislative act as the grant of the charter, the question whether a foreclosure of the mortgage is an exercise of legislative power is not advanced by inquiring what amount of legislative power is retained by the statutory reservations of a right of amendment and repeal. If a foreclosure of the mortgage is not a legislative act, the reservations are immaterial, since, whatever legislative power was reserved, no power was reserved that is not legislative.

The Ashuelot charter is a statute. An amendment or repeal of it would be another statute. And the power of making the second is not constitutionally greater than the power of making the first. A statute of incorporation is a legislative grant, held by the federal court to be a contract and a creation of private rights, protected, in the absence of a reservation, by the contract clause of the federal constitution. But calling it a charter, a grant, or a contract, does not

make it anything more than an exercise of legislative power. A reservation of the right to amend and repeal it is an exercise of the same power,—a legislative retention not of judicial or executive but of legislative power, and not a creation of any power, legislative, judicial, executive, or extra-constitutional. It has the negative effect of preventing the statute of incorporation being exempted by the contract clause from the legislative power of amendment and repeal, and putting it on an equality with other statutes that are not contracts, and are subject to that power. By not giving it a superior position, the legislature leave it on that level of subjection.

The reserved power of amendment and repeal is not anything more than the legislature would have had without a reservation, if statutes of incorporation had been held to be possessed of the ordinary, amendable, and repealable quality of other statutes. With a reservation of that power, an act of incorporation, regarded as a grant, is an alterable and revocable grant, a gift or conveyance of something, a part or the whole of which the grantor can, without the grantee's consent, take back or destroy. If the Ashuelot charter had contained an unlimited reservation of the legislative power of amending and repealing the legislative grant, the state would have reserved, and the corporation by accepting the charter would have consented to the reservation of, the power of taking from the corporation by legislation nothing more than that which, by legislation, the state had granted to it. Its existence, derived from the state, could be terminated by the state. But its right of redemption, like the mortgagee's right of foreclosure, is a piece of private property that cannot be taken away by a revocation of the charter, because it was not given by the charter. Of that property there is no state grant to be rescinded. It could not be granted by the state, because the state had not created or owned it. If it had been granted by the state, there might have been a question that is not raised in this case.

The Ashuelot company holds its equity of redemption as trustee for the stockholders, as Elliot holds the right of foreclosure in trust for the bondholders. An amendment of the charter would not be an exercise of a higher constitutional power than would be employed in a repeal of the charter. And a repeal would not leave the equity of redemption in a worse plight than it would have been in if the same investment had been made, without a charter, in the name of some other trustee, and the trustee had died. The law cannot suffer a trust to fail for want of a trustee; for the beneficiaries have a private right in the trust estate, which is as inviolable as property similarly invested without a trustee. If, with the consent of the stockholders, the charter of a railroad corporation were repealed, its right of way abandoned, and its business discontinued, its real estate held in fee would not escheat, and its rolling-stock and cash would not pass to the state as wrecked goods or treasure-trove. The corporate property remaining in existence could not be confiscated by a legislative decree, and

the right of the stockholders to a distribution of the assets through the agency of a trustee or receiver, or other legal process, could not be denied without a repudiation of constitutional duty. The question whether the termination of this equity of redemption by foreclosure is a legislative act is not affected by the circumstance that the mortgagor is incorporated.

Railway corporations being common carriers, are engaged in a public service. They are public corporations so far as the protection of the public rights is concerned; and their ways, taken for public use, like other highways, are public. Gen. St., c. 146, ss. 1, 2, 3; *McDuffee v. P. & R. Railroad*, 52 N. H. 430, 448, 449, 454. If the public, at its own expense, buys a right of way and builds a road, as in the case of an ordinary town highway, it owns what it buys and pays for. But if, instead of making such an investment of its own money, it allows a turnpike company to take and pay for the right of way and build the road, the public is not the proprietor of the road, as it was not of the money which the company expended. Its right is a right of travel for a reasonable toll. Its right in a railway, owned not by itself but by an incorporated or unincorporated common carrier, is a right of reasonable transportation for a reasonable price. In this case, the mortgaged property being subject to a public use, its owner cannot withhold from the public the use to which it is entitled; but the equity of redemption being private property, the public power to divest the owner of it for the private benefit of the mortgagee cannot rest on the public right of reasonable transportation at a reasonable price. Over the corporation as a common carrier, and over its road as property devoted to a public use, the public power is sufficient for the maintenance of the public rights, but not for the extinction of the private title for a private purpose. It is no more an exercise of legislative power to decree a foreclosure of this mortgage of private property subject to the public right of transportation, than it is to decree a foreclosure against other private property.

It does not appear that there was any public interest to be promoted by a legislative foreclosure. And if there had been such an interest, it does not appear how the public character of that interest would have changed the legal nature of a foreclosure. If in the absence of such an interest a foreclosure would not be an act of a legislative character, it is not apparent how its public utility could give it that character. If the public were the mortgagee, and had every possible interest to deprive the mortgagor of the equity of redemption, that equity would still be private property; for the public would not mortgage its own property to itself. And the question would remain whether a foreclosure is a legislative act. And if the act of 1861 had declared itself to be not an adjudication of private rights, but a protection of the public interest and a regulation of the exercise of the public right of transportation, it would still have been necessary to go into the same inquiry.

The railway, including the right of redemption and the right of foreclosure, may be sold by the power of uniform taxation exercised for a public purpose, compensation being made to the owners in the common benefits of government. And a sale of it for taxes would exhibit the private character of the property. Compensation being made, it may be taken by eminent domain for public use. *Crosby v. Hanover*, 36 N. H. 404, 420; *W. R. Bridge Co. v. Dix*, 6 How. 507; *R. F. & F. R. Co. v. L. R. Co.*, 13 How. 71, 83; Cooley Const. Lim. 526. But the right of redemption was taken neither by the public nor for the public. The public right of using the road was the same before the foreclosure of 1861 as afterwards; and by the foreclosure, the exercise of that right was not regulated. The direct, legal, and practical effect of the act, if it were valid, would be to put an end to the right of the mortgagor, not for the public good, but for the private good of the mortgagee. The public might reap some indirect advantage from a foreclosure, turning the mortgage into an absolute deed. The public might derive a greater advantage from a decree removing the encumbrance, and making the mortgagor's title indefeasible. It might derive a still greater advantage from a decree giving the merged rights of the mortgagor and mortgagee to a third person. It might profit by the transfer of some shops, mills, and farms from their owners to others more thrifty, more enterprising, more generous, more patriotic, or less immoral. But the direct or indirect public interest in such a transfer is not the test of its legislative character.

Calling the legislative act of incorporation a grant, and the legislative act of amendment or repeal a modification or revocation of the grant, does not convey to the legislature a power that is not legislative, nor bestow the character of legislation upon an act not otherwise endowed with that character, nor authorize either branch of the government, or all the branches combined, to make a special decree extinguishing a certain mortgagor's private right of redeeming certain property, for the benefit of the mortgagee, or extinguishing the mortgagee's private right of foreclosure, for the benefit of the mortgagor, without consent, without compensation, without trial, and without notice. Such an act is not an exercise of the legislative, the judicial, or the executive power established by the constitution. It is an exercise of a power not tolerated by the constitution, because not compatible with the liberty the constitution was designed to secure. As neither of the branches of government can acquire, by its own act of reservation, any power exclusively vested by the constitution in either of the others, so neither can acquire, by its own act of reservation, that unlimited power which passed from the British parliament to the provisional government in 1776, and was abolished in 1784. The legislative effort to protect public interests against a contractual abdication of legislative power, by a reservation making a charter amendable and repealable like other statutes that are not contracts, does not

demolish the safeguards provided by the state constitution for private rights, does not unite powers which the constitution has separated, and does not revive the absolutism which the constitution extirpated nearly a hundred years ago.

A slight exercise of unconstitutional power by either department of the government is not less invalid than an extensive exercise of it. The question is not whether the act of 1861, if valid, would have been beneficial to the mortgagor, nor whether the foreclosure, decreed by that act, would, if valid, greatly vary from some other legal method. However slight the exercise of power compared with a repeal of the charter, however trifling the practical effect of it, and however insignificant the departure from other forms of procedure, the act of 1861, not being a legislative act, presents the difference between an unconstitutional foreclosure and a constitutional one.

The application to this case of an argument advanced by Webster, in an opinion given by him, in 1821, upon the validity of a Vermont statute granting a new trial in *Allen v. Hathaway & Pierson*, is decisive: "The standing laws of Vermont, proceeding on the principle that vested rights are not to be divested but by legal process and judicial proceeding, have authorized the supreme court of Vermont to grant new trials, for good cause shown, after judgment. In this very case, it was competent, and is now competent, for the supreme court to award a new trial. Now this must be the exercise either of a judicial or a legislative power. It cannot be both. If it is a power which may be constitutionally exercised by the legislature, for that reason it cannot be exercised by a judicial tribunal. Either therefore the general law of Vermont is unconstitutional, or this act is so." If the foreclosure of the Ashuelot mortgage is a legislative act, the general statute, directing in what court foreclosure suits shall be brought, is an attempt to authorize the court to make laws, and the judgments rendered in such suits, since 1784, are unconstitutional.

It may be doubtful whether some acts are legislative or judicial; but in this case there is no doubt. The foreclosure of the mortgage of private property, like the rendition of a judgment on a bond secured by the mortgage, is a judicial act. It requires notice and an opportunity for a trial of the questions of the existence and amount of the debt, and the existence, legality, and effect of the mortgage. The foreclosure of 1861 would have been invalid if the decree, made by the legislature, had been made by either of the other departments of the government. The extinguishment of the mortgagor's title by a special governmental decree, without consent, compensation, trial, or notice, is not an exercise of any constitutional power.

Motion denied.

SINKING—FUND CASE.

UNION PACIFIC R. CO. *v.* UNITED STATES.1878. 99 *U. S.* 700.¹

APPEAL from the Court of Claims.

The Union Pacific Railroad Company filed a petition in the Court of Claims against the United States, to recover one half the compensation for the transportation of U. S. troops. The defence was, that said half was retained by the Secretary of the U. S. Treasury, and used in the purchase of U. S. bonds for a sinking-fund, in accordance with the U. S. Act of May 7, 1878.

The Union Pacific R. Co. was chartered by Act of Congress, July 1, 1862. The Act provides that U. S. bonds shall be issued to the R. R. Co. as the various sections of the road are completed; that these bonds shall constitute a first mortgage on the road; that all compensation for services rendered by the R. R. Co. for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid; and that, until said bonds and interest are paid, at least five per centum of the net earnings of the road shall also be annually applied to the payment thereof.

July 2, 1864, before the construction of the road was begun, an Act was passed providing that only one half of the compensation for services rendered for the government should be required to be applied to the payment of the bonds issued by government in aid of the construction. This Act also provided that the R. R. Co. might issue its own first-mortgage bonds, and that the lien of the U. S. bonds should be subordinate to that of the bonds thus authorized to be issued by the R. R. Co.

The original Act of 1862, section 18, contains the following provision:—

“And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time—having due regard for the rights of said companies named herein—add to, alter, amend, or repeal this act.”

The Act of 1864, Section 22, provides, “that Congress may at any time alter, amend, or repeal this act.”

May 7, 1878, an Act was passed to amend the Acts of 1862 and 1864. The enacting clause is preceded by a lengthy preamble, or series of preambles, containing fifteen paragraphs, each beginning with “Whereas.” In this preamble it is stated (among other things)

¹ So much of the report as relates specially to the case of *Central Pacific R. Co. v. Gallatin* (heard at the same time), is omitted. The statement as to the case of the *Union Pacific R. Co.* is abridged; and only portions of the opinions are given.—ED.

that the United States have heretofore issued bonds as a loan to the R. R. Co., the principal sums of which amount to \$27,236,512; that the U. S. have paid over \$10,000,000 interest upon these bonds; that the corporation has issued an equal amount of its own bonds, which, if lawfully issued, constitute a prior lien; that the total liabilities of the R. R. Co. to all creditors (including the U. S.), amount to more than \$88,000,000; that the United States are not, and cannot, without further legislation, be, secure in their interests in and concerning said railroad; and that a due regard to the rights of the company, as well as just security to the United States in the premises, require that the previous Acts be altered and amended as hereinafter enacted.

Section 1, of the Act of 1878, provides how net earnings shall be ascertained.

By Section 2, the whole amount of compensation for services rendered for government shall be retained by the U. S.; one half thereof to be presently applied in liquidation of interest paid by U. S. upon bonds; the other half to be turned into a sinking-fund.

Section 3 provides, that there shall be established in the U. S. Treasury a sinking-fund, to be invested in U. S. bonds, and the semi-annual income thereof to be in like manner invested.

Section 4 provides, that the U. P. R. Co. shall annually pay into the U. S. Treasury, to the credit of the sinking-fund, the sum of \$850,000, or so much thereof as shall be necessary to make the five per cent net earnings and the whole earnings for government services, amount in the aggregate to twenty-five per cent of the whole net earnings for the preceding year.

Section 7 provides, that the sinking-fund shall at the maturity of the bonds issued by the U. S. be applied to the payment and satisfaction thereof.

Section 8 provides, that the sinking-fund shall be held for the protection, &c., of holders of mortgage debts of the R. R. Co. lawfully paramount to the rights of the U. S., and for the claims of other creditors lawfully chargeable upon the funds required to be paid into the sinking-fund, according to their respective lawful priorities, as well as for the U. S.

Section 9 provides, that all sums due to the U. S. from the R. R. Co., whether payable presently or not, and all sums required to be paid to the U. S. or to the sinking-fund, are hereby declared to be a lien upon all the property of the company, subject to any lawfully prior lien thereon. But this section shall not be construed to prevent the company from using and disposing of any of its property in the ordinary course of its current business, in good faith and for a valuable consideration.

Samuel Shellabarger and *Jeremiah M. Wilson*, for Union Pacific R. Co.

Charles Devens, Attorney General, and *Edwin B. Smith*, Assistant Attorney General, for the United States.

WAITE, C. J.

The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.

The contract of the company in respect to the subsidy bonds is to pay both principal and interest when the principal matures, unless the debt is sooner discharged by the application of one-half the compensation for transportation and other services rendered for the government, and the five per cent of net earnings as specified in the charter. This was decided in *Union Pacific Railroad Co. v. United States*, 91 U. S. 72. The precise point to be determined now is, whether a statute which requires the company in the management of its affairs to set aside a portion of its current income as a sinking-fund to meet this and other mortgage debts when they mature, deprives the company of its property without due process of law, or in any other way improperly interferes with vested rights.

This corporation is a creature of the United States. It is a private corporation created for public purposes, and its property is to a large extent devoted to public uses. It is, therefore, subject to legislative control so far as its business affects the public interests. *Chicago, Burlington, & Quincy Railroad Co. v. Iowa*, 94 U. S. 155.

It is unnecessary to decide what power Congress would have had over the charter if the right of amendment had not been reserved; for, as we think, that reservation has been made. In the act of 1862, sect. 18, it was accompanied by an explanatory statement showing that this had been done "the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but especially in time of war) the use and benefits of the same for postal, military, and other purposes," and by an injunction that it should be used with "due

regard for the rights of said companies." In the act of 1864, however, there is nothing except the simple words (sect. 22) "that Congress may at any time alter, amend, and repeal this act." Taking both acts together, and giving the explanatory statement in that of 1862 all the effect it can be entitled to, we are of the opinion that Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through Mr. Justice Clifford, in *Miller v. The State* (15 Wall. 498), "it may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets;" and again, in *Holyoke Company v. Lyman* (id. 519), "to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation." Mr. Justice Field, also speaking for the court, was even more explicit when, in *Tomlinson v. Jessup* (id. 459), he said, "the reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State;" and again, as late as *Railroad Company v. Maine* (96 U. S. 510), "by the reservation . . . the State retained the power to alter it [the charter] in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges, and immunities." Mr. Justice Swayne, in *Shields v. Ohio* (95 U. S. 324), says, by way of limitation, "The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration." The rules as here laid down are fully sustained by authority. Further citations are unnecessary.

Giving full effect to the principles which have thus been authoritatively stated, we think it safe to say, that whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment. In so doing it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking-fund to meet it at maturity. Not having done so at first, it cannot now by

direct legislation vacate mortgages already made under the powers originally granted, nor release debts already contracted. A prohibition now against contracting debts will not avoid debts already incurred. An amendment making it unlawful to issue bonds payable at a distant day, without at the same time establishing a fund for their ultimate redemption, will not invalidate a bond already out. All such legislation will be confined in its operation to the future.

Legislative control of the administration of the affairs of a corporation may, however, very properly include regulations by which suitable provision will be secured in advance for the payment of existing debts when they fall due. If a State under its reserved power of charter amendment were to provide that no dividends should be paid to stockholders from current earnings until some reasonable amount had been set apart to meet maturing obligations, we think it would not be seriously contended that such legislation was unconstitutional, either because it impaired the obligations of the charter contract or deprived the corporation of its property without due process of law. Take the case of an insurance company dividing its unearned premiums among its stockholders without laying by any thing to meet losses, would any one doubt the power of the State under its reserved right of amendment to prohibit such dividends until a suitable fund had been established to meet losses from outstanding risks? Clearly not, we think, and for the obvious reason that while stockholders are entitled to receive all dividends that may legitimately be declared and paid out of the current net income, their claims on the property of the corporation are always subordinate to those of creditors. The property of a corporation constitutes the fund from which its debts are to be paid, and if the officers improperly attempt to divert this fund from its legitimate uses, justice requires that they should in some way be restrained. A court of equity would do this, if called upon in an appropriate manner; and it needs no argument to show that a legislative regulation which requires no more of the corporation than a court would compel it to do without legislation is not unreasonable.

The company has been in the receipt of large earnings since the completion of its road, and, after paying the interest on its own bonds at maturity, has been dividing the remainder, or a very considerable portion of it, from time to time among its stockholders, without laying by anything to meet the enormous debt which, considering the amount, is so soon to become due.

Under these circumstances, the stockholders of to-day have no property right to dividends which shall absorb all the net earnings after paying debts already due. The current earnings belong to the corporation, and the stockholders, as such, have no right to them as against the just demands of creditors.

The United States occupy towards this corporation a twofold rela-

tion, — that of sovereign and that of creditor. *United States v. Union Pacific Railroad Co.*, 98 U. S. 569. Their rights as sovereign are not crippled because they are creditors, and their privileges as creditors are not enlarged by the charter because of their sovereignty. They cannot, as creditors, demand payment of what is due them before the time limited by the contract. Neither can they, as sovereign or creditors, require the company to pay the other debts it owes before they mature. But out of regard to the rights of the subsequent lienholders and stockholders, it is not only their right, but their duty, as sovereign to see to it that the current stockholders do not, in the administration of the affairs of the corporation, appropriate to their own use that which in equity belongs to others. A legislative regulation which does no more than require them to submit to their just contribution towards the payment of a bonded debt cannot in any sense be said to deprive them of their property without due process of law.

The question still remains, whether the particular provision of this statute now under consideration comes within this rule. It establishes a sinking-fund for the payment of debts when they mature, but does not pay the debts. The original contracts of loan are not changed. They remain as they were before, and are only to be met at maturity. All that has been done is to make it the duty of the company to lay by a portion of its current net income to meet its debts when they do fall due. In this way the current stockholders are prevented to some extent from depleting the treasury for their own benefit, at the expense of those who are to come after them. This is no more for the benefit of the creditors than it is for the corporation itself. It tends to give permanency to the value of the stock and bonds, and is in the direct interest of a faithful administration of affairs. It simply compels the managers for the time being to do what they ought to do voluntarily. The fund to be created is not so much for the security of the creditors as the ultimate protection of the public and the corporators.

To our minds it is a matter of no consequence that the Secretary of the Treasury is made the sinking-fund agent and the treasury of the United States the depository, or that the investment is to be made in the public funds of the United States. This does not make the deposit a payment of the debt due the United States. The duty of the manager of every sinking-fund is to seek some safe investment for the moneys as they accumulate in his hands, so that when required they may be promptly available. Certainly no objection can be made to the security of this investment. In fact, we do not understand that complaint is made in this particular. The objection is to the creation of the fund and not to the investment, if that investment is not in law a payment.

Neither is it a fatal objection that the half of the earnings for services rendered the government, which by the act of 1864 was to be paid to the companies, is put into this fund. The government is not released from the payment. While the money is retained, it is only that it may be put into the fund, which, although kept in the treasury, is owned by

the company. When the debts are paid, the securities into which the moneys have been converted that remain undisposed of must be handed over to the corporation. Under the circumstances, the retaining of the money in the treasury as part of the sinking-fund is in law a payment to the company.

Not to pursue this branch of the inquiry any further, it is sufficient now to say that we think the legislation complained of may be sustained on the ground that it is a reasonable regulation of the administration of the affairs of the corporation, and promotive of the interests of the public and the corporators. It takes nothing from the corporation or the stockholders which actually belongs to them. It oppresses no one, and inflicts no wrong. It simply gives further assurance of the continued solvency and prosperity of a corporation in which the public are so largely interested, and adds another guaranty to the permanent and lasting value of its vast amount of securities.

The legislation is also warranted under the authority by way of amendment to change or modify the rights, privileges, and immunities granted by the charter. The right of the stockholders to a division of the earnings of the corporation is a privilege derived from the charter. When the charter and its amendments first became laws, and the work on the road was undertaken, it was by no means sure that the enterprise would prove a financial success. No statutory restraint was then put upon the power of declaring dividends. It was not certain that the stock would ever find a place on the list of marketable securities, or that there would be any bonds subsequent in lien to that of the United States which could need legislative or other protection. Hence, all this was left unprovided for in the charter and its amendments as originally granted, and the reservation of the power of amendment inserted so as to enable the government to accommodate its legislation to the requirements of the public and the corporation as they should be developed in the future. Now it is known that the stock of the company has found its way to the markets of the world; that large issues of bonds have been made beyond what was originally contemplated, and that the company has gone on for years dividing its earnings without any regard to its increasing debt, or to the protection of those whose rights may be endangered if this practice is permitted to continue. For this reason Congress has interfered, and, under its reserved power, limited the privilege of declaring dividends on current earnings, so as to confine the stockholders to what is left after suitable provision has been made for the protection of creditors and stockholders against the disastrous consequences of a constantly increasing debt. As this increase cannot be kept down by payment unless voluntarily made by the corporation, the next best thing has been done, that is to say, a fund safely invested, which increases as the debt increases, has been established and set apart to meet the debt when the time comes that payment can be required.

Judgment affirmed.

STRONG J. [dissenting].

The contracts of the government with the Union Pacific Railroad Company and with the Central Pacific, which the act of Congress of 1878 has in view, were not made by the act of 1862, the act chartering the former company, nor by the amending act of 1864. They were made after those acts had been accepted by the companies, and after their chartered rights had been completely acquired. There was no agreement of the companies to repay the loan of government bonds made to them, until the bonds were issued and delivered. The companies were under no obligation to accept the loan and assume the liability resulting from its acceptance. The contracts, therefore, are no part of the charter of the Union Pacific Company, and no part of the acts of 1862 or 1864. They are subsequent to those acts and independent of them. It is true Congress authorized the loan. It made the companies offers to lend upon certain conditions; and when those offers and conditions were subsequently accepted, the contracts of loan were made. Not until then. Before that time there was nothing but an unaccepted offer.

Now, what has been attempted by the act of May 7, 1878? That act was passed with sole reference to this contract, and all its provisions have in view the imposition of additional obligations upon the railroad company. It does not purport to be a repeal of the charter. Its leading purpose is to take control of the property of the debtor, and sequester it for the security of a debt, which, by the terms of the contract, is not due and payable for years to come.

It is true it does not make immediate application of the sums thus withheld and demanded to the extinguishment of the debt. It declares that they shall be applied to the payment of the debt and interest "at the maturity of the bonds." But this is a distinction without a difference, obviously made to evade what it was known could not lawfully be done. An immediate application might as well have been directed. It would probably be better for the debtor if the application were immediately made. The money is taken from the debtor, withdrawn entirely from the debtor's control and use, and put into the treasury of the creditor, and there left to the mere agreement of the creditor to apply it to payment. I apprehend no plain man of common sense will hesitate to conclude that this is exacting payment before the debt is due. If A. borrows from B. \$1,000, and gives his note therefor, payable at the expiration of five years, and at the end of one year the lender demands that there be placed in his hands by the debtor a sum of money to meet the note when it shall fall due, it will hardly be contended that would not be requiring payment before the debtor was bound to pay. And if such a demand could be enforced, it would be at the expense of the contract. What more is the present case? And

were it conceded the act of 1878 does not attempt to enforce the payment before the maturity of the debt, the concession would be of little worth, for it will not be questioned that it attempts to enforce giving additional security for payment beyond that stipulated for in the contract. That is no less a material alteration of the contract, a serious addition to it. The plain truth is, the assertion of such a power is claiming the right to disregard the contract entirely, and substitute for it a different one, without the consent of the debtor.

The right of a promisee to demand payment when the note falls due is a right of property; and equally so is the right of the promisor to hold, as against his promisee, the consideration for the promise until the time stipulated in the note for payment. The promisee has no right to enforce payment, or to enforce giving security for it, if none was promised in the contract. Such a right is no portion of his property, and it can be enforced only at the expense of a clear right of the promisor. On the other hand, the promisor has a right to exemption from liability to give such security. It is incident to his contract. Indeed, it may be said that whatever rights are created by contract, or held under it, if they relate to property, are themselves, in a very just sense, property, and as such are protected by the fifth amendment to the Constitution.

I notice another consideration which, to my mind, is not without weight. It may, I think, well be doubted whether the act of 1878 is even an attempted exercise of legislative power. A statute undertaking to take the property of A. and transfer it to B. is not legislation. It would not be a law. It would be a decree or sentence, the right to declare which, if it exists at all, is in the Judicial Department of the government. The act of Congress is little, if any, more. It does not purport to be a general law. It does not apply to all corporations or to all debtors of the government. It singles out two corporations, debtors of the government, by name, and prescribes for them as debtors new duties to their creditor. It thus attempts to perform the functions of a court. This, I cannot but think, is outside of legislative action and power.

I turn now to what has been most relied upon in support of the validity of the act. I refer to the clauses in the acts of 1862 and 1864, reserving the right to repeal, amend, or alter. There are two such, — one in the act of 1862, and one in that of 1864. That in the latter act is the broadest, and it is as follows: "Congress may at any time alter, amend, or repeal this act." The power thus reserved is one over the act itself, not over any thing that may have lawfully been done under the act, before its repeal or alteration. It is only by great confusion of things essentially distinct that this power can be construed as applicable to a contract made after the corporation came into existence. Besides, the act of 1878 does not attempt to repeal, or alter or

amend, the acts of 1862 and 1864. It changes no franchise granted by those acts, nor does it interfere with its exercise. It interferes only with the fruits of the franchise. The right to possess and enjoy the income of the company is not a franchise. It is an incident of the ownership of the company's property, though the property may be accumulated by the use of the franchise. Concede that Congress has power to regulate the tolls on the railroad, or in some other mode to restrict the use of the franchise, and thus lessen the income, yet the income, whether large or small when made, is the company's property, and, like other property, protected against being taken without due process of law. Or suppose the acts of 1862 and 1864 were repealed, and thus all the franchises granted by them were taken away, the property of the company would remain, and the income thereof, though greatly decreased, would be the property of the stockholders. Nobody denies that. Is the lesser greater than the whole? I repeat, therefore, the act of 1878 is no exercise of the reserved power to alter, amend, or repeal the acts of 1862 and 1864. It is no attempt to make any such repeal or amendment. It is at most an attempt to seize the fruits of the franchise after they shall have become the vested property of the corporations. It is an attempt to sequester the income of the property owned by them. As well might the government attempt to seize and put into its treasury the rents, issues, and profits of the lands granted to them by the third and fourth sections of the act of 1862, and call that an amendment of the act. There is no distinction to be made between the profits of the road and telegraph line and the rents of the lands. None has been attempted.

But if the act of 1878 could be considered an alteration or amendment of the acts of 1862 and 1864, the question would still remain, what was the extent of the power reserved by those acts. I mean the power to alter, amend, or repeal them. All the cases agree that such a reserved power is not without limits. I think its limits may be stated generally thus: It must be exercised, when exerted at all, so as to do no injustice to those to whom the franchise has been granted. Certainly the reservation cannot mean a right to take away the franchise, in whole or in part, and yet hold the grantee to the performance of the duties assumed,—the consideration given for the grant. Nor can it mean to continue in the legislative power which the legislature never possessed, and which it is constitutionally incapable of exercising.

If the acts of 1862 and 1864 were repealed, would not the contract of loan remain unaffected thereby? Can a legislature that offers a contract on certain terms change those terms after they have been accepted and after the contract has been perfected? Yet that is what the act of 1878 attempts to do. A principal who has authorized his agent to make a contract for him may revoke or restrict the agency before any contract is made, but he is bound by a contract made during the continuance of the agent's powers, if those powers were not

transgressed in making it. He cannot afterwards repudiate its terms or add to them. I see no essential difference between such a case and the present. I cannot confound an alteration of the acts of 1862 and 1864 with an alteration of a subsequent commercial contract authorized by those acts, and made between the United States and companies chartered by them. My conviction, therefore, is, that the act of 1878 cannot be defended as a legitimate exercise of the powers reserved to Congress.

I need not say it cannot rest upon what is generally denominated the visitatorial power of the government over its own corporations, though it is upon this power the opinion of the majority of the court largely relies. That power is applicable only to eleemosynary corporations, such as colleges, schools, and hospitals, and the visitation is always through the medium of courts of justice. It is judicial and not legislative. 2 Kent, Com., Lect. 23, sect. 4. To claim, therefore, that, by virtue of that power, a private business corporation can be compelled by legislative action to establish a sinking-fund for the payment of its debts, and deposit it in the treasury of its creditor, is totally inadmissible.

There are, undoubtedly, many cases to be found in which it has been decided that, by virtue of such a reservation as that contained in the acts of 1862 and 1864, a legislature may make new regulations, to some extent, of the action of corporations created by it, — such as prescribing a new measure of tolls, increasing the capital of insurance companies, repealing an exemption from taxation, and the like. So, without the reservations, some new regulations may be prescribed in the exercise of the police power. They are all regulations of the franchise or of its use, — not invasions of rights or property acquired under the franchise subsequently to its grant; and not one of them under the practice of amendment or rightful regulation has undertaken to change or vary any contract the corporation had made, or to control possession of property acquired. The act of 1878 is, I believe, the first assertion of any such force in the reservation. It is a very grave and dangerous assertion. It is especially dangerous in these days of attempted repudiation, when the good faith of the government is above all price. If it can be maintained, the government is no longer bound by any commercial contract into which it may enter with these corporations, though it holds them bound. I cannot assent to any such doctrine; and upon the whole, in my opinion, the act of 1878 is not only unauthorized by any power existing in Congress, but it is an infraction of the prohibition I have pointed out, contained in the fifth amendment of the Constitution.

BRADLEY, J. [dissenting].

The contract between the Union and Central Pacific Railroad Companies and the government was an executed contract, and a definite one. It was in effect this: that the government should loan the com-

panies certain moneys, and that the companies should have a certain period of time to repay the amount, the loan resting on the security of the companies' works. Congress, by the law in question, without any change of circumstances, and against the protest of the companies, declares that the money shall be paid at an earlier day, and that the contract shall be changed *pro tanto*. This is the substance and effect of the law. Calling the money paid a sinking-fund makes no substantial difference. The pretence or excuse for the law is that the stipulated security is not good. Congress takes up the question, *ex parte*, discusses and decides it, passes judgment, and proposes to issue execution, and to subject the companies to heavy penalties if they do not comply. That is the plain English of the law. In view of the limitations referred to, has Congress the power to do this? In my judgment it has not. The law virtually deprives the companies of their property without due process of law; takes it for public use without compensation; and operates as an exercise by Congress of the judicial power of the government.

It will not do to say that the violation of the contract by the law in question is not a taking of property. In the first place, it is literally a taking of property. It compels the companies to pay over to the government, or its agents, money to which the government is not entitled. That it will be entitled by the contract to a like amount at some future time does not matter. Time is a part of the contract. To coerce a delivery of the money is to coerce without right a delivery of that which is not the property of the government, but the property of the companies. It is needless to refer to the importance to the companies of the time which the contract gives. If it be alleged that the security of the government requires this to be done in consequence of waste or dissipation by the companies of the mortgage security, that is a question to be decided by judicial investigation with opportunity of defence. A prejudgment of the question by the Legislative Department is a usurpation of the judicial power.

But if it were not, as it is, an actual or physical taking of property, — if it were merely the subversion of the contract and the substitution of another contract in its place, it would be a taking of property within the spirit of the constitutional provisions. A contract is property. To destroy it wholly or to destroy it partially is to take it; and to do this by arbitrary legislative action is to do it without due process of law.

Nor does the case in hand bear any analogy to what are familiarly known as the *Granger Cases*, reported in 94 U. S. under the names of *Munn v. Illinois*, &c. The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon

the citizen ; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power. It is obvious that the present case does not belong to that category. It is an individual case of private contract between the companies and the government. It is a question of dollars and cents, and terms and conditions, in a particular case. To call the law an exercise of the police power would be a misuse of terms.

Great stress, however, is laid upon the reservation in the charter of the right to amend, alter, or repeal the act.

As a matter of fact, the reservation referred to really has no office in an act of Congress ; for Congress is not subject, as the States are, to the inhibition against passing any law impairing the obligation of contracts. It has become so much the custom to insert it in all charters at the present day, that its original intent and purpose are sometimes forgotten. Since, however, it is contained in the charter of the Union Pacific Railroad Company, it is proper that its meaning and effect should be adverted to.

It seems to me that this clause has been greatly misunderstood. It is a sort of proviso peculiar to American legislation, growing out of the decision in the *Dartmouth College Case*.

In my judgment, the reservation is to be interpreted as placing the State legislature back on the same platform of power and control over the charter containing it as it would have occupied had the constitutional restriction about contracts never existed ; and I think the reservation effects nothing more. It certainly cannot be interpreted as reserving a right to violate a contract at will. No legislature ever reserved such a right in any contract. Legislatures often reserve the right to terminate a continuous contract at will ; but never to violate a contract, or change its terms without the consent of the other party. The reserved power in question is simply that of legislation, — to alter, amend, or repeal a charter. This is very different from the power to violate, or to alter the terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant to the contract itself, and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles ; but interpreted as the reservation of a right to violate an executed contract, it is not sustainable.

The question then comes back to the extent of the power to legislate. But that is a restricted power, — restricted by other constitutional provisions, to which reference has already been made. Certainly the legislature cannot in a charter of incorporation, or in any other law, reserve to itself any greater power of legislation than the Constitution itself concedes to it. It seems to me clear, therefore, that the power

reserved cannot authorize a flat abrogation of the contract by Congress, because, as before shown, such an abrogation would be a violation of those clauses which inhibit the taking of property without process of law and without compensation.

It may be said that by reason of the reserved power to alter and repeal a charter, this court has sustained legislative acts imposing taxes from which the corporation by the charter was exempted. This is true. But the imposition of taxes is preëminently an act of legislation. Its temporary suspension, conceded in a charter, is a suspension of the legislative power *pro tanto*. Being such, a reservation of the right to legislate, or, which is the same thing, to alter, amend, or repeal the charter, necessarily includes the right to resume the power of taxation. The same observations apply to the regulation of fares and freights; for this is a branch of the police power, applicable to all cases which involve a common charge upon the people.

I conclude, therefore, that the power reserved to alter, amend, and repeal the charter of the Union Pacific Railroad Company is not sufficient to authorize the passage of the law in question.

FIELD, J. [dissenting].

The decision will, in my opinion, tend to create insecurity in the title to corporate property in the country. It, in effect, determines that the general government, in its dealings with the Pacific Railroad Companies, is under no legal obligation to fulfil its contracts, and that whether it shall do so is a question of policy and not of duty. It also seems to me to recognize the right of the government to appropriate by legislative decree the earnings of those companies, without judicial inquiry and determination as to its claim to such earnings, thus sanctioning the exercise of judicial functions in its own cases.

It is not material, in the view I take of the subject, whether the deposit of this large sum in the treasury of the creditor be termed a payment, or something else. It is the exaction from the company of money for which the original contract did not stipulate, which constitutes the objectionable feature of the act of 1878. The act thus makes a great change in the liabilities of the company. Its purpose, however disguised, is to coerce the payment of money years in advance of the time prescribed by the contract. That such legislation is beyond the power of Congress I cannot entertain a doubt.

If the company was wasting its property, of which no allegation is made, or impairing the security of the government, the remedy by suit was ample. To declare that one of two contracting parties is entitled, under the contract between them, to the payment of a greater sum than is admitted to be payable, or to other or greater security than that given, is not a legislative function. It is judicial action; it is the

exercise of judicial power, — and all such power, with respect to any transaction arising under the laws of the United States, is vested by the Constitution in the courts of the country.

The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions. Thus an act of the legislature of Illinois authorizing the sale of the lands of an intestate, to raise a specific sum, to pay certain parties their claims against the estate of the deceased for moneys advanced and liabilities incurred, was held unconstitutional, on the ground that it involved a judicial determination that the estate was indebted to those parties for the moneys advanced and liabilities incurred. The ascertainment of indebtedness from one party to another, and a direction for its payment, the court considered to be judicial acts which could not be performed by the legislature. 3 Scam. 238.

HUNT, J., was absent.

CITY OF DETROIT v. DETROIT AND HOWELL PLANK ROAD CO.

1880. 43 *Michigan*, 140.¹

MANDAMUS.

F. A. Baker, E. F. Conely, and Otto Kirchner, Attorney General, for relator.

Chas. A. Kent, and G. V. N. Lothrop, for respondent.

COOLEY, J. A mandamus is applied for in this case to compel the respondent to remove beyond the city limits a toll-gate located on Grand River street. The questions the application presents are questions of statutory construction and of constitutional law.

The respondent was incorporated April 3, 1848, for the purpose of building and maintaining a plank road from the city of Detroit to the village of Howell, with certain specified branches. The third section of the act of incorporation provided that the corporation "shall be subject to the provisions of an act entitled 'An act relative to plank roads,' approved March 13, 1848, except so far as otherwise provided in this act." The fifth section was as follows: "This act shall be and remain

¹ Argument and part of opinion omitted. — ED.

in force for the term of sixty years from and after its passage; but the Legislature may at any time alter, amend or repeal this act by a vote of two thirds of each branch thereof; but such alteration, amendment or repeal shall not be made within thirty years of the passage of this act, unless it shall be made to appear to the Legislature that there has been a violation by the company of some of the provisions of this act: *Provided*, That after said thirty years, no alteration or reduction of the tolls of said company shall be made during its existence unless the yearly net profits of said company, over and above all expenses, shall exceed ten per cent on the capital stock invested, provided there be no violation of the charter of said company." Laws 1848, p. 398.

This act of incorporation was one of a considerable number passed by the same Legislature, all very short, and doing little beyond fixing the line of the proposed road, and the period of corporate existence, but referring for all other directions to the "Act relative to plank roads," subject to the provisions of which they were all made. That act prescribed a method of organization, enumerated the corporate powers and franchises, provided for an annual report to the Secretary of State, prescribed rates of toll, and limited the imposition of taxes. Laws 1848, p. 59.

In 1879 a further section was added to the general act of 1848 as follows: "No plank-road company organized subject to the provisions of this act, shall, without the consent of the local authorities, keep or maintain a toll-gate within the present or future corporate limits of any city, or village; and no such company shall collect toll for any portion of its road, within such limits, on which a pavement is maintained by such municipality. The assent of any such company to this amendment shall not be necessary in order to make this act applicable to such company. And if any plank-road company or companies in this State are, at the time of the passage of this act, maintaining any toll gate within the present corporate limits of any city or village, said plank-road company or companies, are hereby required to discontinue and remove said toll-gate beyond the limits of said city or village, within sixty days after they are notified by the municipal authorities to so discontinue or remove the same." Public Laws 1879, p. 197.

It is upon this last amendment that the questions in this case arise. The toll-gate of the respondent on Grand River street is within the existing corporate limits of the city of Detroit, and the city authorities notified the respondent to discontinue and remove the same more than sixty days before this proceeding was instituted. The respondent denies the validity of the act of 1879, and refuses to conform to it. It is admitted that but for the act of 1879 respondent might lawfully maintain the gate where it is, the city having been extended to embrace it since the gate was located. *Chope v. Detroit & Howell P. R. Co.* 37 Mich. 195.

The effect of this legislation, if valid, would be to take from respondent

ent about two miles and a half of the road upon which it now collects toll. It is not pretended that this is done by reason of any forfeiture done or suffered by the respondent, and if it were, a judicial finding would be necessary. *Flint etc. Plank-Road Co. v. Woodhull* 25 Mich. 99. Nor is it claimed that the act of 1879 was passed as a regulation of police. It would probably be conceded that it goes quite beyond the competency of an act of mere regulation, and that it must be sustained, if at all, as an act passed in the exercise of that complete power to amend and repeal, which was reserved in passing both the general act of 1848 and the charter of respondent. The city relies upon it as an exercise of that power, and not otherwise.

[After discussing the question whether the act of 1879 is invalid on account of its inconsistency with an act passed in 1853.]

But leaving out of view the act of 1853, is the act of 1879 a legitimate exercise of the power to amend the plank-road charters? It has been seen that in the case of this particular company it takes from it about two miles and a half of its road, and this may be and probably is from the most profitable portion of it. That this diminishes essentially the value of the road is not to be doubted, though the extent is immaterial.

There are cases in which amendments to charters having some resemblance to this have been sustained, but it is in general easy to distinguish them. Many of these are cited in the brief for the relator. *Commissioners v. Holyoke Co.* 104 Mass. 446, in which a company having a dam across the Connecticut river was required to construct a fish-way, was a case involving a mere police regulation for the preservation of rights of others in the fishery above and below. All the following cases involved the same principle: *Commonwealth v. Eastern R. R. Co.* 103 Mass. 254, where a railroad company was required to build a station house and stop its trains at a certain locality; *Albany etc. R. R. Co. v. Brownell* 24 N. Y. 345, in which it was held competent to require a railroad company to permit and provide for the crossing of its tract by highways; *Roxbury v. Boston R. R. Co.* 6 Cush. 424, in which a like question was involved; *English v. New Haven etc. Co.* 32 Conn. 240, in which a bridge, made necessary for the convenience of a railroad company, and used by the company and the public, was required to be made wider by the company; *Worcester v. Norwich etc. R. R. Co.* 109 Mass. 103, in which the railroads coming into a city were required to unite in a common passenger station at a point to be determined by commissioners; *Meadow Dam Co. v. Gray* 30 Me. 547, in which a company incorporated to build a dam across a river was required to construct a lock for purposes of navigation; and there are many others of the same sort. Cases involving only the right to change the methods or the extent of taxation, may be dismissed altogether from consideration, as this right must always exist when there is no express contract to the contrary. *East Saginaw Salt Manfg. Co. v. East Saginaw* 13 Wall. 373. So may cases in

volving only the question of the liability of corporations to the control of the general police laws of the State. *Beer Company v. Massachusetts* 97 U. S. 25; *Fertilizing Company v. Hyde Park* id. 659.

But there is no well considered case in which it has been held that a legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights. In some cases the power has been denied where the interest involved seemed insignificant. The case of *Albany etc. R. R. Co. v. Brownell* 24 N. Y. 345 is an illustration. It was there decided that although the legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes, to the same burden except in connection with provision for compensation. The decision was in accord with that in *Commonwealth v. Essex Co.* 13 Gray 239, 253, in which, while the power to alter, amend or repeal the corporate franchises was sustained, it was at the same time declared that "no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." The same doctrine is clearly asserted and affirmed in *Railroad Company v. Maine* 96 U. S. 499, and is assumed to be unquestionable in the several opinions delivered in the *Sinking Fund Cases*, 99 U. S. 700.

But for the provision in the Constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary vocations of life, by gift or descent, or by making profitable use of a franchise granted by the State: it is enough that it has become private property, and it is then protected by the "law of the land." Even municipal corporations, though their charters are in no sense contracts, are protected by the Constitution in the property they rightfully acquire for local purposes, and the State cannot despoil them of it. *Terrett v. Taylor* 9 Cr. 43; *Pawlet v. Clark* 9 Cr. 292; *State v. Haben* 22 Wis. 660; *People v. Common Council* 28 Mich. 228.

We have said nothing of those cases in which charters have been amended by limiting the tolls that may be taken, as it is conceded by

relator that that is not what has been attempted in this case. It was a part of the original contract that the tolls should not be reduced by the State until the annual returns should realize to the stockholders ten per centum annually on their investment, and it is not claimed that that limit has been reached. What the State claims a right to do is to deprive the respondent of the privilege any longer to take tolls for travel and traffic on two miles and a half of its road. If it may do this in respect to one part of the road, it may in respect to any other part. If it may exclude the respondent from Detroit, it may from Howell also, or from any township on the line, and a single section of a statute may annihilate the property of respondent altogether. A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but of spoliation.

It may be that what the Legislature of 1879 proposed to accomplish would in itself work no hardship to respondent, and would be highly desirable to the city; but the principle violated is the fundamental principle that underlies all property; and the first successful inroad upon it that obtains judicial sanction may be a precedent that shall let in innumerable evils. Courts must look beyond the particular case to the governing principle, and be governed by that, regardless of temporary and special inconveniences. But even such inconveniences must be trivial, since the power to appropriate private property to public uses is always ample and always at command.

It results, from what has above been said, that the mandamus must be denied.

The other justices concurred.

DOW v. NORTHERN RAILROAD.

1887. 67 *New Hampshire*, 1.¹

BILL IN EQUITY, by Samuel H. Dow and John E. Robertson, stockholders in the Northern Railroad, against the Northern Railroad, the Boston & Lowell Railroad, and the directors of the Northern Railroad, seeking to enjoin the operation of the Northern Railroad by the Boston & Lowell Railroad under a contract of lease.

Answers were filed, and the case was heard at the trial term before CARPENTER, J., both parties introducing evidence. Facts were found by the court, and the case was reserved for the law term by request of parties.

Only so much of the facts are here given as are material to the points upon which the case was decided.

¹ The greater part of the opinion is omitted. — Ed.

The Northern Railroad was chartered in 1844. The corporation was authorized to construct and keep in use a railroad from Concord to Lebanon. Section 11 provides that "the legislature may alter, amend, or modify the provisions of this act, or repeal the same, notice being given to the corporation, and an opportunity to be heard." The road was constructed and put in operation within a few years after the charter. Chapter 100, Laws of 1883, enacts that (subject to certain conditions and qualifications) "Any railroad corporation may lease its road, railroad property, and interests to any other railroad corporation," upon such terms and for such time as may be approved by a two-thirds vote of the stockholders of each corporation (section 17). This act contains no provision for the compensation of dissenting stockholders. It was assumed that the Northern Railroad had notice of the proposed passage of this statute. On June 18, 1884, the stockholders of the Northern Railroad, by a vote of more than two thirds, approved a lease to the Boston & Lowell. On the same day, pursuant to this vote, the Northern Railroad, by its president, executed to the Boston & Lowell Railroad a lease for ninety-nine years, of the railroad, rolling-stock, etc., of the lessor, the lessee to pay a specified quarterly rental, and perform various other covenants. The plaintiffs voted against approving the lease, and seasonably filed their bill in equity, praying that the Boston & Lowell Railroad be enjoined from operating the Northern Railroad under the lease, and that the Northern Railroad and its directors be ordered to assume the management of the road.

Bingham & Mitchell and Jeremiah Smith, for the plaintiffs.

Josiah H. Benton, Jr. (of Massachusetts), and *William L. Foster*, for the Northern Railroad.

William S. Ladd, Charles H. Burns, Daniel Barnard, and *A. A. Strout* (of Maine), for the Boston & Lowell Railroad.

[Decree for plaintiffs; DOE C. J., SMITH J., and CLARK J., concurring. ALLEN J., dissented. BLODGETT J., CARPENTER J., and BINGHAM J., did not sit. Subsequently to the entry of the decree, DOE C. J., prepared a written opinion. The learned Judge *held*, that the making of the lease was beyond the power of the majority. He then entered into an elaborate examination of the Dartmouth College Case; believing that a full understanding of that case is necessary to explain the history, and to determine the real scope and effect, of the customary clause reserving to the legislature power to alter, amend or repeal corporate charters. His view, as to the Dartmouth College Case, was that both courts were wrong; that the State court erred in holding that the acts of 1816 were not in violation of the State constitution; and that the federal court erred in holding that the federal constitution prohibited a repeal of the charter. He was of opinion that a corporate charter is not a contract within the meaning of the federal constitution, and hence is revocable even though no power of repeal be expressly reserved. After thus discussing the Dartmouth College Case, the learned Judge proceeded to consider the effect of the clause in the

charter providing that the legislature may alter, amend, modify or repeal the provisions of the act. From this part of the opinion, the following extracts are made.]

DOE C. J.

The Northern charter, considered as an agreement in which, by federal construction, the state is one of two contracting parties, is like any private contract made by A and B, which A reserves a right to alter or rescind without B's consent. The reservation enables A to alter his own agreement by partial or total rescission. It does not make him the owner of B's property, nor enable him to take it or control it, or to acquire, over B's life, liberty, or property, any power, limited or unlimited, legislative or non-legislative, by altering B's agreement, and thereby making an agreement for B, and uniting in himself the contractual functions of both parties. If A rescinds a part, B can rescind the rest. A's right to alter his own agreement by rescinding a part of it, is not greater than his right to rescind the whole. He may exercise his reserved right conditionally or unconditionally. He may make his rescission dependent upon B's refusing to make a new agreement by altering the old one. There may be many reserved options as to the manner of performing the original promise of each party; but no legal construction can destroy all or any of B's legal rights by giving A an irrevocable authority to bind B by whatever bargain A chooses to make with himself. While the state is the only assenting party necessary for making, altering, or repealing a charter law, it is not the only party necessary for making a contract either by entering into an entirely new agreement, or by assenting to an alteration of an old one.

"The legislature may amend or repeal the law and the contract of this charter, and they hereby acquire absolute dominion over the grantees, and a right to exercise against them the non-legislative power vested in the imperial parliament of Great Britain, and in every other purely despotic government." Such a reservation in the Northern charter would be inoperative beyond the retention of legislative power.¹ It would not abolish the distinction between the charter law and the charter contract, and would not dispense with the necessity of two assenting parties in a contract. The construction which makes the usual reservation a legislative acquisition of non-legislative power, sets up arbitrary personal will in place of a government of laws. The claim that judges can veto a charter amendment or governmental surrender which seems to them unreasonable (*Sinking Fund Cases*, 99 U. S. 700, 726; *Butchers' Co. v. Crescent City Co.*, 111 U. S. 746, 750,

¹ Among Judge Doe's memoranda, apparently intended to be used in revising his opinion, are found the following sentences:

"Suppose the legislature reserve power to deprive the stockholders of life and liberty, as well as property, at their discretion."

"There must be a limit to the legal power of individuals to deprive themselves, by contract, of their constitutional rights of life, liberty, and property."

751) suggests no limiting law, but another lawless will, concurring or non-concurring on the question of what is reasonable, expedient, or necessary, as a matter of fact. "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." *Yick Wo v. Hopkins*, 118 U. S. 356, 369. Federal decisions based on degrees of reasonableness, policy, or necessity, found by the court as matters of fact in the amendment of charters and the contractual surrender of law-making power, being in conflict with the law of this state, are not followed here, except so far as their authority is paramount on federal questions. The present case is decided upon the local law.

The extension of the Old Colony Railroad from Fall River in Massachusetts to Newport in Rhode Island, authorized by the legislature and a majority of the stockholders, was held to be legal because the business to be done in Rhode Island was of the same kind as that done in Massachusetts. *Durfee v. Railroad*, 5 Allen, 230. The company would be a railway common carrier in both states. The court suggest that a limit of the legislative power of amending the charter, even with the consent of the corporation, might perhaps be found in the doctrine that the corporate powers cannot be extended to enterprises or operations different in their nature and kind from those comprehended in the original charter (*p.* 247). As each stockholder, by taking a share under an alterable charter, assented to an exercise of the entire legislative power of alteration, the doctrine of the *Old Colony Case* is, that he assented to an amendment authorizing the company to extend their road by connecting it with and becoming lessees of all similar roads, and taking assignments of all human business "of a nature similar to" that "embraced within the original grant of power." After the company had exhausted its power of expansion within the limit of similarity, this doctrine of the enlargement of one kind of business, if sound, would not sustain a legislative amendment authorizing the company to transfer all its possessions by a lease under which the lessee would take the place of the lessor in the lessor's common carrier business. As that would be all the business of that kind in the world, the subsequent business of the lessor would be of a different kind. A leasehold extension of the Old Colony, leaving that company for a short time in the business of a common carrier on its original track between Boston and Fall River, followed by its transfer of that track to a lessee for ninety-nine years, would illustrate the difference between taking a lease and giving one. A legislative power of authorizing a majority of the stockholders to make leases as well as accept them, would be based on the theory that each subscriber, by taking a share of stock and paying one hundred dollars to be used in building and operating a railroad from Boston to Fall River, agreed not only that he might be embarked in

the operation of that and all other railroads, but also that he might be thrown out of the carrier business of the road he helped to build, and exposed to the risks of all the railway investments of mankind except the one for which he subscribed.

[After citing *Hartford & N. H. R. Co. v. Croswell*, 5 Hill, 383, 385, 386.]

"That case," says *Selden, J.*, in *Buffalo, etc., Railroad Co. v. Dudley*, 14 N. Y. 336, 355, "is in direct conflict with several English cases." Parliament having authority to make any person a member of any incorporated or unincorporated partnership without his consent, and to make any alteration in his helpless condition, and the question in English courts being merely whether parliament intended to exercise this non-legislative power, the decisions of that question are inadvertently cited in a manner that tends to throw doubt upon all constitutional security of private rights, and to countenance the idea that the people of New York are living under a government as absolute as the one they cast off when they ceased to be subjects of Great Britain.

Cases in which a construction is given to the exercise of the unlimited power of parliament, without occasion to consider the legal nature of legislative power, and without regard to the question whether the absolute sovereignty exercised in a particular instance is legislative, judicial, or executive, or neither, have a tendency, so far as they are followed in this country, to obliterate an essential feature of American government, and to reestablish the arbitrary dominion that was extinguished in this state by the constitution. *Hammersmith & City Railway Co. v. Brand*, L. R. 4 H. L. 171, 196. The argument from British precedent begs the question of legislative authority, and takes it for granted that the people of New Hampshire, who went through the Revolution for rights of life, liberty, and property which they considered natural, essential, and inherent (*Bill of Rights, art. 2*), proceeded deliberately, at the close of the struggle, to set up a government as despotic as the one they overturned. The argument proves too much. If it had any force it would show that the members of the senate and house, by amending wills, conveyances, and laws, can transfer to themselves all property, public and private, that is subject to their legislative control.

The usage of the American colonies and states before the adoption of constitutional limitations has been a misleading precedent. In *Rice v. Parkman*, 16 Mass. 326, decided in 1820, a legislative resolve, passed in 1792, had authorized A to sell and convey the real estate of B and C. Of this resolve the court said,—"It is not legislation, which must be by general acts and rules, but the use of a parental or tutorial power for purposes of kindness." "The only object of the authority granted by the legislature was to transmute real into personal estate for purposes beneficial to all who were interested therein. This is a power frequently exercised by the legislature of this state since the

adoption of the constitution, and by the legislatures of the province and of the colony while under the sovereignty of Great Britain, analogous to the power exercised by the British parliament, on similar subjects, time out of mind." Under the non-legislative reign of parliament, and the pre-constitutional government of this state, there was no limit of governmental power to be decided or considered by the court. The acts of banishment and confiscation, passed and enforced by the provisional government of the Revolution (Acts of Nov. 19 and 28, 1778, Belk. Hist. N. H., c. 26), were as valid as the *Habeas Corpus* act. *Atherton v. Johnson*, 2 N. H. 31, 34; *Thompson v. Carr*, 5 N. H. 510; *Gould v. Raymond*, 59 N. H. 260, 272-275; *Jackson v. Stokes*, 3 Johns. 151. If, upon true construction, not modified by usage, the Massachusetts legislature of 1792 could authorize A to make the conveyance that was upheld in *Rice v. Parkman*, they could make the conveyance without delegating their authority, could sell A's property without his consent, or authorize B and C to sell it, and can act as guardian and absolute sovereign in all cases in which they choose not to employ agents, in their unlimited control of property and its owners. And if, in addition to the powers of eminent domain, taxation, and police, the senate and house have a general power of conveying what the state does not own, they can lease any railroad on any terms to whom they please and dispose of any private property as they see fit, can transfer all real and personal estate to one man, or make an annual distribution of it, or enact a universal community of interest in it, and leave it, in common and undivided, to be used by the strongest. On the question of power, English precedent and the pre-constitutional practice of this country establish either boundless despotism or nothing.

In Massachusetts as well as in New Hampshire the law-making branch of government did not wholly abstain from non-legislative acts after the adoption of the legislative limitation. In this state the senate and house continued to grant new trials until 1817. *Merrill v. Sherburne*, 1 N. H. 199. The same practice, continued in Massachusetts after the adoption of the state constitution, is now held to be illegal. Quincy Mass. Reports, 473, n. 17. But the continued exercise of the non-legislative and unlimited power of parliament and the pre-constitutional government of Massachusetts, in the conveyance of property not belonging to the state, was held legal in *Rice v. Parkman*, which has become a leading case. Cool. Const. Lim. 97-106. The contrary doctrine has been settled here sixty years. 4 N. H. 572-574. If the property of incorporated or unincorporated partners can be leased for ninety-nine years without the owners' consent, it can be sold without their consent. In Massachusetts and other states, the legislative power of selling private property for the owners' benefit is a survival of the consolidated form of government that enabled parliament and the colonial assemblies to disregard the difference between making law and administering it. When one sale of such property is ordered by a judicial decree (*Old South v. Crocker*, 119 Mass. 1, 26, 27; *Bam-*

forth v. Bamforth, 123 Mass. 280; *Petition of Baptist Church*, 51 N. H. 424; *Methodist Episcopal Society v. Harriman*, 54 N. H. 444, 446; Gray Perp., s. 590, n. 3), and another sale of the same kind and for the same purpose is ordered by a vote of the senate and house, either the court legislate, or the legislature exercise judicial power. There is usurpation on one side or the other.

If a reservation of the power of amending a general or special act of incorporation is a creation, and a conveyance to the legislature of a non-legislative power of altering a partnership contract authorized by the same act, the senate and house, by reservation, can create and acquire the non-legislative power of altering all agreements. "All future contracts, not made under and in accordance with this act, are prohibited. The power of making a contract under this act is granted to those only who accept and exercise the granted power with and upon the condition that the contract may be amended by a power hereby reserved and hereby vested in the legislature. This act shall be a part of every contract; and every stipulation excluding it, and every device for evading it, shall be illegal and void. All law inconsistent with this act is hereby repealed." Such an act in amendment of the law of contracts would assume, not that partnership and all other private contracts are laws of the land, makable and alterable only by law-makers, but that they are not laws, and can be made and altered by persons who are not legislators, and that the non-legislative power of altering them can be reserved by the senate and house, and added to the law-making power of those assemblies. The power thus reserved would be appropriately exercised by such acts as these: "A's written agreement to pay B \$10, ten months after date, without security (or with such security only as a court can give by preventing the debtor's diversion of his property from the payment of the debt before it is due, when the threatened and wrongful diversion is found upon a judicial trial), is hereby amended: the debtor shall give security by paying \$1 a month to the trustee of a sinking fund of which the creditor is hereby appointed trustee; but if the debtor chooses to avoid the risks of the sinking trust, he may pay \$1 a month to the creditor as creditor." "B's indebtedness to A, secured by mortgage, is hereby amended: the mortgage is discharged." "C's agreement to pay D \$10 is hereby amended: the debtor shall pay \$100." "The partnership agreement of E, F, and G to run a daily coach between Concord and Lebanon is hereby amended: a majority of them may assign all the partnership business to H by a lease of all the partnership property for ninety-nine years." Each of these amendments would be enacted to overcome an objection, made by one of the contracting parties, to an alteration of his agreement. The amendments would not be valid unless they were law. If they would be law, they could not be made by the contracting parties, and the original contracts and all other agreements not made by law-makers would be void.

In the supposed case of A's unsecured indebtedness, a legislative

amendment requiring him, without due process of law, to give such security as his creditor could obtain for due cause shown in a judicial proceeding, would assume that any judgment which one branch of the government can render after trial, another branch can render without a trial; that each branch can do whatever can be done by either of the others; and that their prohibited union (*Ashuelot Railroad Co. v. Elliot*, 58 N. H. 451-453) has been effected in a triple form. If the state happened to be the creditor, this amendment would be both a commission issued by the creditor appointing himself judge of his own case, and a judgment rendered by him for the enforcement, not of his legal rights legally ascertained, but of his view of them. A reserved power of amendment that could thus alter a contract of the state, could confer upon any creditor the right of rendering summary judgment against his debtor without trial, and could authorize any debtor to enforce his view of his rights in the same manner.

The supposed amendment of the partnership contract, accompanied by a statutory regulation of the powers of partners under all partnership contracts subsequently made, would mark the distinction between the legislative character of an act that is general and prospective, and the non-legislative character of one that is special and retrospective. One is an effort to make a contract for E, F, and G by altering their agreement, and to bind them by a partnership contract they have not made: the other requires no one to be a partner.

All rights of property are not contractual; and there are other rights besides those of property: but persons of contractual capacity, who are under the necessity of making any purchase, sale, or other agreement, have no rights that cannot be taken from them by statute, if the senate and house can reserve the non-legislative power of amending contracts. An act providing that "All rights of property, liberty, and life of every person hereafter making any agreement may be amended by the legislature," would complete the restoration of despotism. Governments established by agreement can be changed or abolished by agreement: but the government which the legislative, judicial, and executive servants of the state are sworn officially to support, is the limited one established in 1784, and not the unlimited one that was then abolished. *Gould v. Raymond*, 59 N. H. 260, 272-275.

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EXTRACT FROM THE OPINION OF THE JUSTICES IN
ANSWER TO QUESTIONS PROPOSED BY THE HOUSE
OF REPRESENTATIVES IN 1891.*66 New Hampshire, p. 641 to p. 643.*

As confiscation is a matter of substance and effect, and not of form or method, the mode of accomplishing it is as immaterial as any name that may be given it. Not being a legislative act in a constitutional sense, it is equally ineffectual whether attempted by a repeal or amendment of general or special acts of incorporation (G. L., c. 152), or by the repeal or amendment of the common or statutory law authorizing the organization of voluntary associations, religious societies, and partnerships (G. L., cc. 117, 118, 151, 153), or by the repeal or amendment of the common law or statutes regulating the business of any or all unincorporated persons, and the conveyance, inheritance, and use of their homesteads, tools, and stock in trade. All effective statutes are amendments. A statute amending the Concord charter can be nothing but an alteration of some law, either unwritten, or written in the charter or elsewhere. If a legislative power of amendment were a power of confiscation, it could be exercised as well by an alteration of some other law as by an alteration of a charter, and as well against unincorporated as against incorporated persons.

The argument for confiscation by amendment assumes that by the clause which the Dartmouth decision made necessary for the retention of the legislative power of altering the Concord charter, the senate and house altered the constitution, and created and acquired a power that is not legislative. The charter is a statute which the grant of legislative power in the second article of the state constitution authorizes them to amend. Reserving the power of amendment is merely not parting with it. The retention of power that can exist only within constitutional limits is not an expansion of those limits. The eighteenth section of the charter could have been written in this form: The legislative power of amendment, vested by the constitution in the senate and house, is hereby retained by them, and is hereby extended beyond the constitutional province of legislation, and enlarged into a power of confiscation. — Such an extension clause cannot be implied. If it were implied, it would be no stronger than if it were expressed. If it were expressed, it would be void. The act of keeping the amending power does not add a word to the constitution, nor take a word from it, nor change the meaning given to “legislative power” by the bill of rights. It neutralizes the federal decision, that a charter is a contract protected by the federal constitution against impairment by state law. The entire effect of the reservation is to leave this charter unaffected by that federal construction of the federal constitution. It releases the senate and house from the restraint which that construction put upon their law-making capacity. Thus liberated, they can amend the charter

by legislation, as they could have amended it without the reservation if the federal constitution had not been adopted, or the federal court had held that an act of mere incorporation is not a contract.

The questions proposed by the house are to be answered as they would have been at an earlier day, when the reservation was not necessary for an exercise of the legislative power of altering the law written in the charter. The question of confiscation by amendment is simplified, and cleared of irrelevant matter, by considering it as of the period between 1784 (when the constitution of New Hampshire took effect) and the subsequent adoption of the constitution of the United States. In July, 1784, the legislature could pass an act of eminent domain under which the owners of land in the Merrimack valley, between Concord and Massachusetts, could be compelled to sell to John Stark a right of way for a railroad, to be operated by him, as an unincorporated common carrier, using any kind of motive power. *Moore v. Veazie*, 32 Me. 343, 355; *Hull v. Railroad*, 21 Monthly Law Rep. 138, 141; *Ash v. Cummings*, 50 N. H. 591, 613, 614. He could institute legal proceedings for taking the right of way, and when he paid the land-owners the judicially ascertained amount of their damages, he could lawfully build and work the Concord road. The property which he bought and paid for would be his; the right to be carried by him on the road for a reasonable price would be public. If he had built the road in 1785, and the legislature had enacted in 1786 that his railroad and his farm should become the property of the state when the state paid him nine tenths or one tenth of their value, the confiscation of one tenth or nine tenths of either piece of property under that act in 1786 would have been a wrong against which he would have had no federal protection. *Owings v. Speed*, 5 Wheat. 420. There was no federal court in which he could resist it, and no federal ground on which it could be held illegal in this court. As it would have been an attempt to destroy rights of property and equality secured by the New Hampshire bill of rights, it would not have been an exercise of legislative power.

If the supposed statute of 1784 had been a corporate charter as well as an act of eminent domain, and Stark had accepted it and become a corporation, his right of property in his road would have been as inviolable as if he were not incorporated. Had the legislature reserved the power of amendment and repeal, his case would not have been altered. In 1786 the reservation would have been inoperative and useless. Without the reservation, the senate and house could repeal his charter, or amend it to any extent within the bounds of legislation. Neither without the reservation, nor with it, would his road be more liable to total or partial confiscation than his farm. The subsequent adoption of the federal constitution, its prohibition of state laws impairing the obligation of contracts, the federal decision that a charter is a contract protected by that prohibition, and the avoidance of that decision by reservations of the power of charter amendment and charter repeal, did not add a power of confiscation to the legislative power of 1784.

OHIO EX REL. v. NEFF.

1895. 52 *Ohio State*, 375.¹

ERROR to the Circuit Court of Hamilton County.

Proceedings in *quo warranto*, at the relation of the directors of the Cincinnati University, to oust the defendants from the positions heretofore held by them, of trustees of the Cincinnati College.

Cincinnati College was incorporated by the Act of January 22, 1819; the object of the incorporation being declared to be "the erection and maintenance of a college." By Section 8, "This act shall be subject to such alterations as the general assembly may from time to time see proper to make." The charter provides that the funds of the college shall consist of five thousand shares of twenty-five dollars each; and that the affairs of the college shall be under the management of a board of trustees, to be elected annually by the shareholders. By Section 7, the trustees of the college were authorized to exercise all the powers granted by a previous act of incorporation to the directors of the Cincinnati Lancaster Seminary; and were also authorized to apply the surplus funds of said seminary to the use of the college. The college received about \$10,000 from the seminary property, and about \$40,000 from subscriptions to its own shares; and later, in 1835, about \$4,000 more from additional subscriptions to shares. Various sources of instruction were from time to time attempted; but were all abandoned except a law school, which has been continuously and successfully maintained for more than fifty years.

In 1892 the general assembly passed an Act to amend the Act of 1819, incorporating the Cincinnati College. A portion of the amendatory Act is as follows:

"Whereas, the endowment of The Cincinnati College as at present invested and managed, is not sufficient to enable it to carry out the purposes of its charter; and,

"Whereas, in the opinion of the general assembly, it would be advantageous to The Cincinnati College and to the University of Cincinnati, and to the public generally, that the government of the two institutions should be joined and consolidated; therefore,

"SECTION 1. *Be it enacted by the General Assembly of the State of Ohio*, That sections 3, 4, and 5, of the act entitled 'An act to incorporate The Cincinnati College,' passed the 22d day of January, A. D., 1819, be amended so as to read as follows:

"SEC. 3. The affairs of the said Cincinnati College shall hereafter be under the management of the directors, for the time being, of the University of Cincinnati, which directors shall be, and they are hereby constituted the board of trustees of The Cincinnati College, and they

¹ Statement abridged. Arguments and part of opinion omitted. — Ed.

are hereby authorized to exercise all the powers granted by law to the board of trustees of The Cincinnati College.

"SEC. 4. Be it further enacted, that the management of the funds, and of other matters belonging to or connected with the said Cincinnati College, shall be solely in the hands of the board of trustees aforesaid, and the said funds shall be administered for the purpose of carrying out the objects of the charter of The Cincinnati College, in connection with the funds and administration of the University of Cincinnati."

"SEC. 2. Be it further enacted, that sections 3, 4, and 5 of the said act of January 22, 1819, entitled 'An act to incorporate The Cincinnati College,' be, and the same are hereby repealed."

The Circuit Court dismissed the petition, whereupon the relators brought the record to this court to be reviewed on error.

J. B. Foraker, Wilby & Wald, and Matthews & Cleveland, for plaintiffs in error.

E. W. Kittredge, John F. Follett, and J. W. Warrington, for defendants in error.

BRADBURY, J. [After stating the case.] The constitutionality of this statute is assailed on a number of grounds, one of which is that it violates that provision of the nineteenth section of article I of the constitution of Ohio, which asserts that "Private property shall ever be held inviolate."

Whether the statute is obnoxious to that constitutional provision depends, 1, whether it violates the property rights of The Cincinnati College, and 2, if it does so, whether that corporation is entitled to the protection secured by the clause of the constitution of this state, above quoted.

[The learned Judge answered both the foregoing questions in the affirmative; giving reasons substantially similar to those of MARSHALL, C. J., in the Dartmouth College Case. The opinion then proceeds.]

We now come to the consideration of the provision in the charter of The Cincinnati College, which reserves to the general assembly the right of amendment. This reservation would be wholly unnecessary if The Cincinnati College had no rights of property which the general assembly was bound to respect. If the legislature, at its will could divest this corporation of its property, the legislative control of the institution would be absolute, for by taking away its entire property rights, all effectual corporate action would be at once paralyzed. Thenceforward it would be powerless to advance the purposes of its creation.

The authorities agree in holding that the legislative power of amendment and alteration thus reserved in charters, is not absolute, although its boundaries are not yet established. In Kentucky this power of amendment seems to be limited to those matters which concern the relations established by the charter between the corporation and the state.

“The power to alter or amend the contract, in our conception, is to change it *as between the original parties, and such others only, as have been permitted, by their mutual consent, to come into the enjoyment of its benefits and privileges*; not to compel one of the parties to operate in conjunction with others, and share with them the privileges and benefits of the contract.” *Sage v. Dillard*, 15 B. Monroe, 359.

Whatever difficulties have been encountered by the courts in ascertaining the limits of this reserved legislative power, they concur in denying that under it, the legislature can strip a corporation of its rights of property.

“The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, *the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases.*” *Shield v. Ohio*, 95 U. S. 324; *Detroit v. Plank Road Co.*, 43 Mich., 140; *Orr v. Bracken Co.*, 81 Ky. Rep. 593.

The Cincinnati College was the lawful owner of the property in its possession; it is immaterial whether it was acquired from The Cincinnati Lancaster Seminary that it succeeded, or by subscriptions and donations subsequently made. This property had been intrusted to it for the purposes of establishing and maintaining a “college,” no specific branches of learning were prescribed, or method of instruction commanded. Primary, academical, medical, legal and philosophical courses were from time to time attempted; all of them except the law school, proved unsuccessful and were abandoned; the latter has been continuously and successfully maintained for nearly sixty years, and substantially the entire income of the institution during that period has been devoted to its maintenance and improvement, without material objection appearing to have been made by any one of the donors. The facts that such donors of the property to this institution, gave it with knowledge that no specific branches of learning or method of instruction were prescribed by its charter, together with the brief history of its various educational attempts and failures just adverted to, and the acquiescence of such donors therein, tend to show that these donors entrusted to this chosen instrument of their will a wide discretion respecting the course and method of instruction to which their donations were to be devoted, and if good faith is to be kept with these donors, we must deny to the legislature the powers to seize the fund thus raised, and transfer it from these chosen agents to others, in whose discretion they did not confide. This power, we think is prohibited by section 19, of article I, of the constitution of 1852, which declares the inviolability of private property. This conclusion makes the consideration of the other questions raised in argument unnecessary.

Judgment affirmed.

STEARNS v. STATE OF MINNESOTA.

1900. 179 U. S. 223.¹

ERROR to the Supreme Court of Minnesota.

Action by the State against Stearns, county auditor of Aitkin county, praying that a peremptory writ of mandamus should issue, directing the auditor to place upon the tax list of the county, for the year 1897, a tract of land belonging to the St. Paul & Duluth R. R. Co., and not used in the operation of its road. The District Court adjudged that the writ should issue; and, on appeal to the Supreme Court of Minnesota, the judgment was affirmed (72 Minnesota, 200). The case is brought on error to the Supreme Court of the United States at the instance of the R. R. Co.; and involves the question whether the real estate belonging to it, and not used in the operation of its road, is subject to taxation according to its value, or is excepted from such ordinary rule of taxation by virtue of a contract alleged to have been made many years ago by legislation of the state, to the effect that railroad companies should pay a certain per cent. on their gross earnings in lieu of taxes on all their property.

The constitution of Minnesota, adopted in 1858, provides in substance that there shall be equality in taxation, that all taxable property shall have a cash valuation, and that laws shall be passed taxing all real and personal property (subject to exceptions not here material) according to its true value in money.

Certain lands were granted by the U. S. Congress to Minnesota, to aid in the building of a railroad. The Minnesota legislature, in 1865, passed an act granting these lands to the Lake Superior & Mississippi R. R. Co. The St. Paul & Duluth Co. is the successor in interest of that company, and has succeeded to all its rights, privileges, immunities and property.

The Minnesota act of Feb. 23, 1865, granting these lands to the predecessor of the St. Paul & Duluth R. R. Co., provides:—

“That in consideration of lands granted by this act, and of the lands, rights, privileges, and franchises which have heretofore been granted to said railroad company, the said company shall, on or before the 1st day of March of each and every year after said railroad is completed and in operation, pay into the treasury of the state 3 per cent. on the gross earnings of said railroad, which sum shall be in lieu and in full of all taxation and assessments upon the said railroad, its appurtenances and appendages, and all other property of said company, real, personal and mixed, including the lands hereby and heretofore granted to said company, or so intended to be granted. Provided, however, that the lands hereby and heretofore granted to

¹ Statement rewritten. Only part of case is given.—Ed.

said company shall be subject, like lands of individuals, to be taxed as fast as the same are sold or conveyed, or contracted to be sold, or are leased by said company, or the stumpage upon any lands is sold or contracted to be sold by said company; but no mortgage or trust deed executed by said company upon said lands shall, for the purpose of taxation, be construed as such sale, conveyance, lease, or contract of sale."

An amendatory act, passed March 3, 1865, reduces the percentage payable on gross earnings during ten years; and provides that, after the expiration of that period, the company shall annually "pay into the treasury of this state three per cent. of the gross earnings of said railroad; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessment whatever."

The second section of this amendatory act provided for acceptance of the provisions of the act by the railroad company; that when accepted "the same shall become obligatory upon the state and upon said company;" and they were accepted. Thereafter, as admitted, the railroad was constructed by the company "in reliance upon said act." Taxes were paid by the railroad company on its property in accordance with the terms of this alleged contract until 1895, and during those years the state made no attempt to levy any taxes upon these lands.

In 1871 the following amendment to the state Constitution was by vote of the people duly adopted (Minn. Laws 1871, p. 41):—

"Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this state or operating its road therein, or which may be hereafter organized, shall, in lieu of all other taxes and assessments upon their real estate, roads, rolling stock, and other personal property at and during the time and periods therein specified, pay into the treasury of this state a certain per centum therein mentioned of the gross earnings of such railroad companies now existing or hereafter organized, shall, before the same shall take effect or be in force, be submitted to a vote of the people of the state, and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them."

In November, 1896, this statute passed in 1895 (Laws 1895, p. 378), was adopted by the people:—

"Sec. 1. All lands in this state heretofore or hereafter granted by the state of Minnesota or the United States or the territory of Minnesota to any railroad company shall be assessed and taxed as other lands are taxed in this state, except such parts of said lands as are held, used, or occupied for right of way, gravel pits, side tracks, depots, and all buildings and structures which are necessarily used in the actual management and operation of the railroads of said companies. Provided, that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings in the same

manner and in the same amount as is now provided by law, and that nothing in this act contained shall be construed to repeal said laws, except in so far as the same relate to the tax upon said lands.

"Sec. 2. Such portion or portions of any act or acts, general or special, of the state or territory of Minnesota heretofore enacted which provides or attempts to provide for any exemption of lands hereby declared taxable, from taxation, or for any other method of taxing said last-mentioned lands different from the method of taxing other lands in this state, or which are in any manner inconsistent with the provisions of this act, are hereby repealed.

"Sec. 3. If this act shall be held to be void so far as it applies to the land of any particular railroad company in this state, it shall not be ground for declaring it void or inapplicable to any other company not similarly situated."

Under these provisions the state proceeded to levy taxes upon the lands of the St. Paul & Duluth company, and the validity of such taxation is the question involved.

The Supreme Court of Minnesota *held*, that the legislative acts, purporting to exempt the lands from taxation in the ordinary way upon the basis of their cash valuation, were unconstitutional when enacted, and remained so until validated by the constitutional amendment of 1871; that this ratification or validation of the legislative acts was a qualified one, the right to repeal or amend being reserved by necessary implication; that the statute of 1895 was valid; and that the lands were now taxable upon their cash value.

C. W. Bunn and Wm. B. Hornblower, for plaintiff in error.

H. W. Childs and W. B. Douglas, for defendant in error.

[The Justices of the U. S. Supreme Court were all of opinion that the judgment of the State Court should be reversed.

The majority *held*, that the legislative acts of exemption were valid and binding from their passage, creating an obligation which could not be modified by the constitutional amendment of 1871.

The minority, on this point, adopted the opposite view, being substantially the same taken by the Minnesota court.

All the Justices agreed that, if the exemption was to be regarded as subject to amendment or repeal under the constitutional provision of 1871, yet the act of 1895 was not a valid exercise of the alleged power to amend. Below will be found a part of the opinion on this point of BREWER, J., speaking for the majority, and the entire opinion on this point of WHITE, J., speaking for the minority, which included HARLAN, GRAY, and McKENNA, JJ.]

BREWER, J.

But is there no limitation upon the power of amendment? The law of 1895 adopted by the people does not release railroad companies from the burden of paying three per cent upon their gross earnings into the state treasury, but simply operates to put certain

properties belonging to them outside of the protection of that commutation. Was such an amendment within the contemplation of the constitutional provision of 1871? It may seem a not unreasonable modification to exempt from the contract such property as is not used for railroad purposes, but would not the legislation assume a different aspect if it had subjected to ordinary taxation all the railroad property, except locomotives, and upon them continued the burden of the payment of three per cent of the gross earnings? Of course, if there be no limitations in respect to the scope of amendment it would be within the power of the State to subject the bulk of the railroad property, whether used or not used for railroad purposes, to the burden of ordinary state taxation; and taking a single item like locomotives, without which the road could not be operated, continue upon the companies the duty of paying three per cent of the gross earnings. While it may be that no such inconsiderate action is to be expected, the possibility of such action suggests a query whether the power of repeal or amendment, preserved by the constitutional amendment of 1871, has not some limitations.

Giving to that power full scope, it may be said that if the prior legislation was unauthorized by the constitution, a repeal of the amendment would wipe out the whole provision in reference to railroad taxation, and subject all railroad property within the limits of the State to the ordinary rule in respect to taxation. So it may be that the reserve power of amendment carries with it the right to increase or diminish the rate per cent of taxation. But a different question is presented when it is insisted that the power of amendment carries with it the right of continuing the rate per cent as to part only, but not all of the property covered by the original contract. For, as stated, if the State can withdraw the lands not used for railroad purposes from the scope of this contract commutation, can it not to-morrow likewise withdraw the lands which are used for railroad purposes, including therein the right of way, the tracks thereon, all the grounds occupied by station houses, etc., and then, on the day thereafter, withdraw from it all the personal property of the companies, except their locomotives, and still hold the corporations to the burden of the contract? May it not be fairly contended that the privilege of amendment reserved was as to the rate, and not as to the property to be included within the commutation? That the power of amendment has its limitations, or rather that an amendment may not be wholly as to the right of the State, and absolutely ignoring the right of the other party to the contract, has been adjudged by this court in *Louisville Water Company v. Clark*, 143 U. S. 1. In that case it was held that while under a statute the water company had been exempted from taxation on condition that it supplied water free to the city of Louisville, an act withdrawing that exemption from taxation, although silent as to the corresponding obligation of the water company, must be construed as releasing it

from an obligation based upon such exemption. So it may well be said in the case before us that a contractual exemption of the property of the railroad company in whole, upon consideration of a certain payment, cannot be changed by the State so as to continue the obligation in full, and at the same time deny to the company, either in whole or in part, the exemption conferred by the contract.

WHITE, J.

Although I dissent, for the foregoing reasons, from some of the grounds stated in the opinion of the court, I yet concur in the judgment of reversal upon one ground expressed therein. Conscious that nothing is needed to strengthen the conclusive reasoning by which the proposition is sustained in the opinion of the court, nevertheless, as the question presents itself to my mind in a somewhat different aspect from that considered by the court, the additional grounds which cause me to concur will now be stated.

In 1871 an amendment to the constitution of Minnesota, which is set out in the opinion of the court, was adopted by a vote of the people. The opinion of the Supreme Court of Minnesota in the case at bar holds that the effect of that amendment was to ratify and confirm the gross receipt tax laws and to deprive the general assembly of all power to repeal or amend such laws, unless the legislative act so doing was submitted to and ratified by a vote of the people. Accepting this construction as conclusive, it follows that the gross receipt tax laws, even if they contained a grant of exemption, were no longer in violation of the constitution of the State, but did not evidence irrevocable contracts, since they were subject to repeal or amendment by a legislative act approved and ratified by a vote of the people. This suit rests upon an act of the general assembly of Minnesota, approved by the people in 1896, which it is claimed was the first act which repealed or amended the gross receipt tax law relating to the rights of the corporation now here, to the extent that it provided that the public lands given to the railroad should be taxed before the corporation had parted with its title. Before examining the scope of the act relied upon, it is important to bear in mind the relations which are engendered when a contract is entered into by a State subject to the reserved power to repeal, alter or amend. In such case no irrevocable contract, protected from impairment under the Constitution of the United States, takes effect, because it is impossible to conceive that contract rights which are conferred subject to the power of repeal, alteration or amendment are protected from an impairment which under the terms of the grant the State has reserved a right to make. *Louisville v. Bank of Louisville*, 174 U. S. 439, 444; *Citizens' Savings Bank v. Owensboro*, 173 U. S. 636, 644, *et seq.*

But whilst this is settled, it has also been equally determined that the reserved right to repeal, alter or amend does not confer mere

arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by depriving of the equal protection of the laws or of the constitutional guarantee against the taking of property without due process of law. *St. Louis, Iron Mountain &c. Railway v. Paul*, 173 U. S. 404, 408, and cases cited. And an apt illustration of the application of this doctrine is found in *Louisville Water Co. v. Clark*, 143 U. S. 1.

Will, then, the enforcement of the amendatory act, which is here relied upon, providing for the taxation of the lands, before the corporation had parted with its title to them, in spite of the continued exaction of the gross receipt tax, deprive the corporation of its property without due process of law, or deny to it the equal protection of the laws? The repealing act says:—

“SEC. 1. All lands in this State heretofore or hereafter granted by the State of Minnesota or the United States or the Territory of Minnesota to any railroad company shall be assessed and taxed as other lands are taxed in this State, except such parts of said lands as are held, used or occupied for right of way, gravel pits, side tracks, depots, and all buildings and structures which are necessarily used in the actual management and operation of the railroads of said companies.”

But these provisions, which in and of themselves are clearly an amendment of the gross receipt tax laws, are accompanied by the following proviso:—

“Provided, that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings *in the same manner and in the same amount* as is now provided by law, and that nothing in this act contained *shall be construed to repeal said laws*, except in so far as the same relate to the tax upon said lands.” [Italics are mine.]

Considering for a moment the ratified agreement which the gross receipt tax law embodied, it is patent that the duties which it imposed and the obligations to which it gave rise were in the strictest sense reciprocal or commutative; that is, that the agreement to pay the gross receipt tax, and necessarily the amount of those taxes, was predicated on the obligation on the part of the State to regard the payment of said tax as the discharge by the corporation of all taxes due upon all its real or personal property. The amendatory act, therefore, whilst increasing the sum of the obligation of the corporation to the State to the extent that the lands are no longer to be represented by the gross receipt tax, yet at the same time retains in favor of the State the right to take the whole amount of the stipulated payment of the gross receipt tax in the same manner as theretofore, that is, by the contract. That is to say, the amendatory act preserves the contract in favor of the State as an entirety, by retaining all the obligations due by the railroad to the State, and yet purports to repeal, alter or amend the contract by relieving the State from its obligation

to the corporation to include all the property of the latter for the purpose of taxation by a gross receipt tax, which was the consideration upon which the obligation of the corporation to pay such tax rested. This consequence is made certain by the provision that the gross receipt tax, despite the amendment, shall remain payable *in the same amount, and in the same manner* as before the passage of the amendatory act, and is additionally made evident by the provision of the amendatory act declaring that it "*shall not be construed to repeal*" the gross receipt tax act. The situation created by the amendatory act may be thus illustrated: The State leases a building to it belonging for a term of years, conditioned on the payment of a stipulated amount of rent annually. The consideration of the obligation of the lessee to pay in such case would of course be the right of occupation granted by the State, and the continued right of the State to collect the rent would depend upon the enjoyment by the tenant of the right of occupation which the contract granted. Now, then, if in such a contract the power was reserved to repeal, alter or amend, and it was exercised by declaring that the right of occupation should cease, but that the duty to pay the rent should continue in the same amount and in the same manner stated in the contract, and that nothing in the amendatory act should be construed as relieving the lessee from the duty to pay the whole of the stipulated rent, a condition strictly analogous to that which arises from the amending act relied on in the case at bar would be presented.

My understanding does not permit me to doubt that to preserve in this case the contract in its entirety, so far as the rights of the State are concerned, and at the same time to destroy the reciprocal duty owed by the State to the other contracting party, is not to repeal, alter or amend the contract at all, but, whilst preserving it, to endeavor by an act of arbitrary power to impose a burden incompatible with the very provisions and terms of the amendatory act itself. As has been previously said, the consideration of the contract obligation of the corporation to pay the gross receipt tax was the duty on the part of the State to consider such payment as a discharge of all taxes upon all the real and personal property of the corporation. The agreements being thus interdependent are of necessity indivisible, and to retain the entire duty or right of one party to the contract must lead to the preservation of the corresponding and reciprocal right or duty of the other. In reason, the argument comes to this, that the act purporting to amend, on its face cannot be declared to have done so, without concluding at the same time both that it did alter, repeal and amend, and that it did not. Under these circumstances, to enforce the amendatory act would necessarily be to deny to the corporation the equal protection of the laws, since it would leave the corporation subject to taxation, not by the general laws of the State but by the provisions of a contract, and at the same time subject the corporation to a burden wholly incompatible with its

liability under the contract. It would be a denial of due process of law to the corporation, since it would be but the recognition of the right of the State, without hearing and without process of any kind, to condemn the corporation to the performance of a duty alleged to be resting on it, and at the same time retain in favor of the State as against the corporation an obligation wholly at variance and in absolute conflict with the supposed duty arbitrarily declared by the amendatory act to rest upon the corporation.

ST. LOUIS, &c. R. CO. v. PAUL.

1899. 173 U. S. 404.¹

ERROR to the Supreme Court of Arkansas.

Action by Paul against an Arkansas railroad corporation to recover \$21.80, due him as a laborer, and a penalty of \$1.25 per day for failure to pay him what was due him when he was discharged.

Plaintiff relied on the Arkansas Act of March 25, 1889. Defendant contended that this act was unconstitutional. Section 1 of the act is as follows: "Whenever any railroad company or any company, corporation or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or subcontractor engaged in the construction of any such road or bridge, shall discharge, with or without cause, or refuse to further employ any servant or employé thereof, the unpaid wages of any such servant or employé, then earned at the contract rate, without abatement or deduction, shall be, and become due and payable on the day of such discharge, or refusal to longer employ; and if the same be not paid on such day then, as a penalty for such non-payment, the wages of such servant or employé shall continue at the same rate until paid. *Provided*, Such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time."

The Supreme Court of Arkansas gave judgment for Paul (64 Arkansas, 83).

John F. Dillon, Winslow S. Pierce, and David D. Duncan, for plaintiff in error.

A. H. Garland and R. C. Garland, for defendant in error.

FULLER, C. J. Plaintiff in error was a corporation duly organized under the laws of Arkansas and engaged in operating a railroad in that State.

The state constitution provided: "Corporations may be formed under general laws; which laws may, from time to time, be altered or repealed. The general assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at

¹ Statement abridged. — Ed.

the adoption of this constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this State; in such manner, however, that no injustice shall be done to the corporators." Art. XII, § 6. This constitution was adopted in 1874, but, prior to that, the constitution of 1868 had declared: "The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws; and all such laws may, from time to time, be altered or repealed." Art. V, § 48.

In *Leep v. Railway Co.*, 58 Arkansas, 407, section one of the act of March 25, 1889, was considered by the Supreme Court of Arkansas, and was held unconstitutional so far as affecting natural persons, but sustained in respect of corporations as a valid exercise of the right reserved by the constitution "to alter, revoke or annul any charter of incorporation."

The court conceded that the legislature could not under the power to amend take from corporations the right to contract, but adjudged that it could regulate that right by amendment when demanded by the public interest, though not to such an extent as to render it ineffectual, or substantially impair the object of incorporation.

As the constitution expressly provided that the power to amend might be exercised whenever in the opinion of the legislature the charter might "be injurious to the citizens," and as railroad corporations were organized for a public purpose; their roads were public highways; and they were common carriers; it was held that whenever their charters became obstacles to such legislative regulations as would make their roads subserve the public interest to the fullest extent practicable, they would be in that respect injurious, and might be amended; and as it was the duty of the companies to serve the public as common carriers in the most efficient manner practicable, the legislature might so change their charters as to secure that result. And the court said: "If the legislature, in its wisdom, seeing that their employes are and will be persons dependent on their labor for a livelihood, and unable to work on a credit, should find that better servants and service could be secured by the prompt payment of their wages on the termination of their employment, and that the purpose of their creation would thereby be more nearly accomplished, it might require them to pay for the labor of their employes when the same is fully performed, at the end of their employment. If it be true that in doing so it would interfere with contracts which are purely and exclusively private, and thereby limit their right to contract with individuals, it would nevertheless, under such circumstances, have the right to do so under the reserved power to amend." But the court added that it did not follow that the legislature could by amendment fix or limit the compensation of employes, and particularly not as the right to amend was to be exercised so "that no injustice shall be done to the corporators;" that, however, this act was not obnoxious to that objection, as it left "to the corporations the right of making contracts with their employes on advantageous terms."

In respect of the provision that the unpaid wages then earned at the contract rate were to become due and payable on the cessation of the employment, "without abatement or deduction," the court held that that did not "require the corporation to pay the employé all the wages to which he would have been entitled had he fully performed his contract up to the time of his discharge, notwithstanding he had failed to do so, and had damaged the corporation thereby;" but that it meant "that the unpaid wages earned at the contract rate at the time of the discharge shall be paid without discount on account of the payment thereof before the time they were payable according to the terms of the contract of employment."

Construing the statute thus, and, by elimination, confining it to the corporations described, its validity was sustained as within the reserved power of amendment; and the case was approved and followed in that before us.

The scope of the power to amend, and the general subject of the lawfulness of limitations on the right to contract were considered at length, with full citation of authority, in both these decisions.

The contention is that as to railroad corporations organized prior to its passage, the act was void because in violation of the Fourteenth Amendment. Corporations are the creations of the State, endowed with such faculties as the State bestows and subject to such conditions as the State imposes, and if the power to modify their charters is reserved, that reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation; and as this amendment rested on reasons deduced from the peculiar character of the business of the corporations affected and the public nature of their functions, and applied to all alike, the equal protection of the law was not denied. *Missouri Pacific Railway v. Mackey*, 127 U. S. 205.

The question then is whether the amendment should have been held unauthorized because amounting to a deprivation of property forbidden by the Federal Constitution.

The power to amend "cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made," Waite, C. J., *Sinking Fund cases*, 99 U. S. 700; but any alteration or amendment may be made "that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights," Gray, J., *Commissioners v. Holyoke Water Power Company*, 104 Mass. 446, 451; *Greenwood v. Freight Co.*, 105 U. S. 13; *Spring Valley Water Works v. Schottler*, 110 U. S. 347.

This act was purely prospective in its operation. It did not interfere with vested rights, or existing contracts, or destroy, or sensibly encroach upon, the right to contract, although it did impose a duty in

reference to the payment of wages actually earned, which restricted future contracts in the particular named.

In view of the fact that these corporations were clothed with a public trust, and discharged duties of public consequence, affecting the community at large, the Supreme Court held the regulation, as promoting the public interest in the protection of employes to the limited extent stated, to be properly within the power to amend reserved under the state constitution.

Inasmuch as the right to contract is not absolute, but may be subjected to the restraints demanded by the safety and welfare of the State, we do not think that conclusion in its application to the power to amend can be disputed on the ground of infraction of the Fourteenth Amendment. *Orient Insurance Company v. Daggs*, 172 U. S. 557; *Holden v. Hardy*, 169 U. S. 366; *St. Louis & San Francisco Railway v. Matthews*, 165 U. S. 1.

Gulf, Colorado and Santa Fé Railway v. Ellis, 165 U. S. 150, 159, is not to the contrary, and was properly distinguished from this case by the Supreme Court of Arkansas. There a state statute provided for the assessment of an attorney's fee of not exceeding ten dollars against railroad companies for failure to pay certain debts, and the exaction was held to be a penalty, although no specific duty was imposed for the non-performance of which it was inflicted. This court said: "The statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties — duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State." The conclusion was that the subjection of railroad companies only, to the penalty, was purely arbitrary, not justifiable on any reasonable theory of classification, and that the statute denied the equal protection of the law demanded by the Fourteenth Amendment. In this case the act was passed "for the protection of servants and employes of railroads," and was upheld as an amendment of railroad charters, such exercise of the power reserved being justified on public considerations, and a duty was specially imposed for the failure to discharge which the penalty was inflicted. The penalty was sustained because the requirement was valid.

Judgment affirmed.

ATCHISON, T. & S. F. R. R. v. CAMPBELL.

1900. 61 *Kansas*, 439.¹

ERROR from Court of Appeals.

Action by *Campbell v. R. R. Co.*, to recover money paid as passenger fare from Kansas City, Kansas, to Attica, Kansas. Campbell shipped a car-load of live stock from Attica to Kansas City. On the going trip he rode free on a stock-shipper's contract issued to him by the R. R. Co. at the shipping point. On the return trip he demanded to be carried free, in accordance with the following provision of Chapter 167, Laws of 1897:—

“Whenever any railroad company, or corporation, doing business within the limits of this state, shall receive and ship any live stock by the car-load, said company, in consideration of the usual price paid for the shipment of said car, shall pass the shipper or his employee to and from the point designated in the contract or bill of lading, without further expense to the shipper in the way of fare. . . .”

Campbell's demand for free carriage on the return trip was refused. To avoid ejection he paid the required fare; and then brought the present action. The Court of Appeals rendered judgment in favor of Campbell (8 *Kansas Appeals*, 661).

A. A. Hurd, W. Littlefield, and O. J. Wood, for plaintiff in error.

Sankey & Campbell, for defendant in error.

DOSTER, C. J. [After stating the case.] The sole question involved in the case is the constitutionality of the legislative enactment under which the demand for free transportation was made.

[After quoting the act.]

The above act is assailed upon the ground of its repugnancy to that portion of the fourteenth amendment to the constitution of the United States which reads: “Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” Speaking for myself, I am of the opinion that a strained and artificial construction has been often placed upon this constitutional provision, especially by the federal courts, for the purpose of bringing within its prohibitive terms much wholesome state legislation. For instance, I do not believe that the word “person” used in the clause above quoted was designed to include corporations, nor that it can in reason bear that signification when read in connection with the preceding clauses of the section and interpreted in the historic light of the origin and purpose of the amendment. However, the federal courts, the authoritative expositors of the federal constitution, departing from the view first taken by them, have been for many years holding that a corporation was a “person” within the meaning of the provision above quoted. Those decisions are, of course, binding upon

¹ Statement abridged. — Ed.

the state courts. Being, therefore, under the compulsion of the now settled rule of interpretation, I agree with my associates that the above-quoted enactment cannot be upheld. It operates as a deprivation of property without due process of law, and is a denial of the equal protection of the laws.

The property of a railroad company consists not alone in its franchise to be a corporation, nor its right of way and track, nor its rolling-stock and other tangible property, but it consists, in its most essential character and important sense, in the right to charge and collect tolls for the transportation of persons and property over its line. Without the right to take tolls such corporation could not do business, and a denial of its right to take tolls would as effectually render valueless all of its other property as a confiscation of its other property would defeat its ability to carry on its business. Upon the conception of the right to take tolls as a species of property belonging to railroad corporations rest all the decisions of all the courts, both state and federal, denying the right of state legislatures to restrict such tolls below a reasonable amount. It needs but a glance at the act in question, and but a moment's thought over the consequences to result from a sanction of its provisions, to perceive that it strikes vitally at the fundamental right of a railroad company to own and enjoy that species of property which exists in the form of its franchise to charge and collect tolls. It purports in its title to be and is "An act to require railroad companies to furnish free transportation to shippers of stock in certain cases"; and in its body it requires railroad companies, "in consideration of the usual price paid for the shipment of a car of stock, to pass the shipper or his employee to and from the point designated in the contract or bill of lading, without further expense to the shipper in the way of fare."

Upon no theory whatever, consistent with the idea that the franchise of railroad companies to take tolls is a species of property, or consistent with the adjudications of the courts that such right of property is protected by the fourteenth amendment to the federal constitution, can such an enactment be upheld. Once grant that so much of the property of railroad companies as is involved in their right to charge passenger fare to shippers of stock can be taken away by legislative enactment, and it necessarily follows that the like property of theirs which consists in their right to charge passenger fare to other shippers of other kinds of property can also be taken away for like reasons; and once grant, upon like considerations, that the property right of railroad companies to take tolls for passenger carriage can be thus taken away, and the right to take tolls for freight transportation can be likewise taken away; and once grant that the right to take tolls for freight and passenger carriage can be taken away, and it follows that the right to own and possess the rolling-stock and other like property necessary to the operation of the road can be likewise taken away; in short there would be no end to the extension of legislative authority over the right of railroad companies to own and enjoy pro-

perty. It would be no answer to say that the enforcement of the act in question would not sufficiently impair the property right of the companies to take tolls as to be substantially detrimental to their interests. Rights are not measured or ascertained by the extent of the injury resulting from their impairment or denial. They do not cease to exist merely because the hurt to them may be slight. Rights reside in principles and not in the physical ability of the claimant of rights to do without a minor portion of them.

Again, speaking for myself, I am a firm believer in the right of the legislature of this state, under the reserved power of the constitution (art. 12, § 1), to amend or add to the original acts providing for the incorporation of companies, and to amend or add to the original body of laws governing them, without declaring its enactments to be amendatory in character. However, its power of amendment in such cases is limited to such enactments as do not substantially impair the vested rights of the corporation. (7 A. & E. Encycl. of L., 2d ed., 675.) I therefore agree with my associates that the act in question, even if it be regarded as an exercise of the reserved power of the legislature to amend the charter of railroad corporations, is a substantial impairment of their vested rights.

We do not mean to say that the legislature is powerless to declare circumstances or prescribe conditions under which railroad companies may be required to furnish transportation to shippers of live stock or other merchandise over their lines. However, those circumstances or conditions, if declared or prescribed, must exist in the form of considerations or equivalents for the transportation furnished. It may be that railroad companies can be compelled to carry patrons of their lines for some other consideration than cash fares. To illustrate — but only to illustrate, not to decide — it may be that a legislative enactment which imposed upon shippers of live stock the obligation to care for their stock *en route*, and to that extent to relieve the trainmen of the burden of its care, and which required the company to transport the shipper free as an equivalent for his relief of the train employees in the way stated, would be constitutionally valid — would not be a taking of private property without compensation. But the enactment in question does not provide for the equivalent of labor performed for transportation furnished. It declares that the transportation shall be furnished “in consideration of the usual price paid for the shipment of said car.” What the railroad company is required to do is not required of it as a compensation for anything to be done for it by the shipper, but is required of it in the form of a gratuity over and above the usual and ordinary charges for transportation. The enactment is not framed upon the assumption that the usual price paid for the shipment of live stock is excessive to the extent of the passenger carriage of the shipper to and from the place of shipment, and that in order to make good the excess the shipper shall be transported free, but it is framed upon the assumption that the charge for the transportation of the car of stock is a reasonable one.

The brief of counsel for defendant in error suggests the importance of the shipper's accompanying his stock in order to care for it *en route*. We do not judicially know that it is important or advantageous to the shipper or to the company for the former to accompany his stock to market, nor does the act assume the importance or advantage either to the shipper or the company in the former's accompanying the stock. It imposes on him no such requirement. So far as the act is concerned, he may accompany his stock or he may ride on another train. There is nothing whatever in the act from which an idea of obligation on the part of the shipper to pay or perform anything as an equivalent for his transportation can be derived. However, turning to the shipping contract made by the defendant in error, we perceive in it certain stipulations imposing on him the obligation to accompany and care for his stock, but this contract is no part of the statute in question. The statute does not purport to be framed upon the assumption that such contracts are or will be entered into between railroad companies and shippers of live stock. The contract is apart from the statute. None of its provisions is included within the terms of the statute. In short, there is no theory upon which this act can be upheld, and, therefore, we are constrained to hold it to be unconstitutional and void.

No cases of a like character have been brought to our attention except that of *Lake Shore Railway Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. That case involved the validity of an act of the legislature of Michigan requiring railroad companies to keep for sale 1000-mile tickets, at specified rates less than the regular rates, to be issued in the name of the purchaser and the members of his family, and to be good for use for two years from the date of sale. Commenting on this enactment the court said :—

“If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the legislature, it may lower them, provided it does not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations.”

The judgments of the court of appeals and of the district court are reversed, and the latter court is directed to enter judgment for the defendant below.

YEATON v. BANK OF THE OLD DOMINION.

1872. 21 *Grattan (Virginia)*, 593.¹

ASSUMPSIT by the Bank to recover a debt due from Yeaton. The Bank of the Old Dominion was a Virginia corporation, located in Alexandria; with a branch bank at Pearisburg. The branch bank was not an independent corporation operating under a charter from the legislature, but was simply the agent or branch of the Bank of the Old Dominion, subject to the charter of its principal or mother bank. The legislature reserved "the right to repeal, alter or modify the charter of any bank at its pleasure." At the trial the defendant claimed the right to pay his debt to the Bank of the Old Dominion by tendering certain notes issued by the branch Bank of the Old Dominion at Pearisburg, equal in amount to the debt due to the plaintiff.

The Code of 1860, Chapter 58, Section 16, provides as follows: "though a bank have a branch, all its notes shall be signed by the president and countersigned by the cashier of the parent bank. All such notes shall be received in payment of debts to the bank, whether contracted at the parent bank or branch." In 1862, Alexandria was within the lines occupied by the Federal troops, and continued to be under the U. S. authority during the civil war. In 1862, Pearisburg was within the Confederate lines. March 29, 1862, the Virginia Legislature, at Richmond, passed an act authorizing banks to issue notes of a less denomination than five dollars, to an amount not exceeding ten per cent of their capital. May 16, 1862, an act was passed amendatory of the last mentioned act, containing the following provision: "Provided further, that if any bank be disabled from complying with this act by reason of its being within the lines of the enemy, each branch of such bank not within the lines of the enemy, is required [under certain penalties] within ninety days from the passage of this act, to issue such notes (that is, notes of less denomination than five dollars), to an amount equivalent to ten *per centum* of the capital of such branch, independently of the bank of which it is a branch." The act of May 16, 1862, also provides that "notes hereby authorized to be issued may be signed by such officer or officers of such bank or branches as may be designated for that purpose by the respective boards of directors." The notes tendered in the present case were issued under the alleged authority of the above statutes, and were signed by the president and cashier of the branch bank. It was contended that the above acts of 1862 should be regarded as amendments of the charter of the Bank of the Old Dominion, under the power reserved to the legislature to repeal, alter or modify bank char-

¹ Statement abridged. Part of opinion omitted. — Ed.

ters. It was admitted that neither the directors nor the stockholders of the Bank of the Old Dominion ever accepted any change or modification of the charter of said bank.

In the court below, the case was submitted upon agreed facts, and judgment was rendered for the plaintiff. To this judgment a writ of error and supersedeas was awarded.

Brent & Wattles, and *Neeson*, for appellant.

Claughton, for appellee.

CHRISTIAN, J.

The power of the Legislature "to repeal, alter or modify the charter of any bank at its pleasure," must be held to be limited to this extent. It may certainly repeal the charter of any bank, but it cannot compel a bank to accept an amendment or modification of its charter. Nor is any such amendment or modification of its charter binding upon the bank *without its acceptance*. Banks are private corporations, created by a charter, or act of incorporation from the government, which is in the nature of a *contract*, and therefore, in order to complete the creation of such corporations, something more than the mere *grant* of a charter is required; that is, in order to give to the charter the full force and effect of an executed contract, it must be *accepted*. It is clear that the government cannot enforce the acceptance of a charter upon a private corporation without its consent. *Angell & Ames on Corporations*, § 81; *Rea v. V. Ch., &c. of Cambridge*, 3 Burr R. 1647, 1661; 3 Hill's R. 531. As was said in *Ellis v. Marshall*, 2 Mass. R. 279: "That a man may refuse a grant, whether from the government or an individual, seems to be a principle too clear to require the support of authorities." The terms offered by the government may, therefore, be acceded to or refused by the body corporate, and, if not acceded to, they have no binding effect. *Dartmouth College v. Woodward*, 4 Wheat. R. 518; 1 Greenl. 79; 10 Wend. R. 266; 1 Story's Eq. 207. These well settled principles are everywhere recognized as applicable to the original charters of incorporation; and upon principle and authority they apply with equal force to any *amendment or modification* of the charter as well as to the original charter. Though the Legislature may have the reserved power to amend or modify a charter of incorporation, it can no more force the corporation to accept such amendment or modification, than it could have forced upon them the acceptance of the original charter without their consent. Under the reservation they can repeal or destroy the charter, without any consent on the part of the incorporators, but as long as they remain in existence as a corporate body, they necessarily have the power to reject an amendment or modification of their charter. The power reserved by the Legislature gives the right certainly to repeal or destroy, but so far as the right to modify or alter is concerned, it is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the consent of

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the other contracting party. These principles grow out of the nature of charters or acts of incorporation, which are regarded in the nature of contracts. The amendment or modification must be made by the parties to the contract, the Legislature on the one hand, and the corporation on the other, the former expressing its intention, by means of a legislative act, and the latter assenting thereto by a vote of the majority of the stockholders, according to the provisions of its charter, or by other acts showing its acceptance.

The reservation of the right to alter, amend or repeal the act by which the corporation is created, may be prudent and salutary; but it seems to be a necessary implication, that if the Legislature should undertake to make what in their opinion is a legitimate alteration or amendment, the corporation has the power to reject or accept it, whatever may be the consequences. One consequence undoubtedly is, that the corporation cannot conduct its operations in defiance of the power that created it; and if it does not accept the modification or amendment proposed, must discontinue its operations as a corporate body. But such amendment or modification cannot be forced upon the corporation without its consent. *Sage, &c., v. Dillard, &c.*, 15 B. Mun. R. 340; *Allen v. McKean*, 1 Sumner's R. 277; *Durfee v. Old Colony and Fall River R. R. Co.*, 5 Allen's R. 230. Every amendment or modification of a charter of incorporation is nothing more than a *new contract*, which is not binding upon the corporate body until accepted by them.

Applying these doctrines, which seem to be well settled, to the case before us, it is manifest that the Bank of the Old Dominion cannot be held bound by the acts of 1862 as amendments of its charter; the facts agreed being "that neither the board of directors nor the stockholders of said bank ever accepted any change or modification of the charter of said bank subsequent to the 24th of May 1861." This would be true upon the authorities cited, even if the Bank of the Old Dominion had been located within the territorial jurisdiction of the Richmond Legislature. But when it is remembered that this bank was located at Alexandria, which was taken possession of by the Federal authorities on the 24th May 1861, who held such possession until the close of the war; that the restored government of Virginia extended over the city of Alexandria during the war and at its close; that the majority of its stockholders, both in number and amount, resided in Alexandria and in States north of the Potomac; that a majority of its directors lived in the city of Alexandria and acknowledged allegiance to the so-called restored government; in the light of all these facts, it is manifest that this corporation thus situated in respect to its location, its stockholders and board of directors could not, in any respect, be affected by any legislation of the Richmond government. That government, it is true, as a *de facto* government, exercised its authority within the limits of its jurisdiction, over all matters, civil and local, and obedience to its authority was not only a necessity, but a duty.

Thorington v. Smith, 9 Wall. U. S. R. 1. But its jurisdiction could certainly not be extended beyond its territorial limits, into sections of the State in the permanent occupancy of the Federal armies, and under the acknowledged authority of the so-called restored government of Virginia. *Bank of the Old Dominion v. Mc Veigh*, 20 Gratt. 457.

It is no answer to this view that the *branch bank* at Pearisburg was within the territorial jurisdiction of the Richmond government, and subject to its authority. This bank was not an independent corporation. It had no charter; it was but a branch of its mother bank at Alexandria, *subject to its charter*. It was but the agent, the mother bank being its principal. It could do no act to bind its principal, without the consent and authority of that principal. Nor could the Legislature authorize the branch bank which owed its existence to the charter of the mother bank, to issue small notes, or to do any other act as a bank, without the consent of the mother bank. The only authority which the Legislature could exercise was that which it reserved under the power "to repeal, modify or alter" the charter of the mother bank. I have already shown that this was not done by the acts of 1862, which could not operate upon the Bank of the Old Dominion as a change or modification of its charter.

STAPLES, J., concurred in the judgment of the court; but he did not concur in the views of CHRISTIAN, J., upon the power of the General Assembly to modify the charters of corporations.

MONCURE, P., concurred in the opinion of CHRISTIAN, J.

Judgment affirmed.

WILLIAMS v. NALL.

1900. *Court of Appeals of Kentucky*, 55 *Southwestern Reporter*, 706.¹

HOBSON, J. The present constitution of the state was adopted September 28, 1891. After this, on December 21, 1891, a corporation under the name of the Nall & Williams Tobacco Company was formed pursuant to the provisions of chapter 56 of the General Statutes, which were then in force. Among the powers of such corporations, the statute authorized the incorporators in their articles to exempt the private property of the members from liability for corporate debts (Gen. Stat. p. 763), and by their articles these incorporators so provided. By section 3 of the state constitution, which was then in force, it is provided: "Every grant of a franchise, privilege or exemption shall remain subject to revocation, alteration or amendment." One of the special aims of the constitution was to rid the state of special legislation, and secure a more perfect uniformity in the laws

¹ Portions of opinion are omitted. — Ed.

of the state. To this end, section 245 directed the appointment of commissioners to revise the statute laws of the commonwealth. The commissioners so appointed reported to the next general assembly a bill which was passed by it entitled "An act providing for the creation and regulation of private corporations" (Sess. Acts, 1891-1893, p. 612). This act, with some amendments, now constitutes chapter 32 of the Kentucky Statutes, and contains, among others, the provision (section 547) that the stockholders of each corporation thereafter created shall be liable to its creditors individually to the extent of the amount of their stock at par value in addition to the amount of such stock; also the further provision (section 573) that after September 28, 1897, this statute shall apply to all existing corporations created or organized under the laws of the state, so far as it would apply to them if thereafter created. On October 13, 1897, appellant, P. P. Williams, filed this suit in equity against the corporation and the other stockholders, alleging that he held stock in the corporation to the amount of \$35,000 out of a total paid-up stock of \$100,000; that the stock was not profitable; that he was unwilling to be responsible for the debts of the corporation, or for it to continue in business making him responsible therefor; that on September 21, 1897, he had notified the appellees of this, demanding the liquidation of the corporation as of date September 28, 1897, and that this they had refused. He prayed the appointment of a receiver to wind up the business of the corporation, or that he be allowed to dissolve his connection with it on equitable terms. To this petition the court below sustained a demurrer, and, he failing to plead further, the action was dismissed.

It is earnestly insisted for the appellant that when he put \$35,000 of his fortune in this enterprise it was on condition that the remainder of what he had was not to be responsible for the corporate debts, and, while the legislature had the power to modify the charter of the corporation, and impair the value of what he had put into it, it could not reach out into his private estate, and place that also in the power of the corporation by making it liable for the corporate debts. Several important questions are necessary to the decision of the case: (1) Does the statute above referred to make stockholders in corporations in existence when it was enacted liable personally to the extent of the amount of their stock for all debts of the corporation created after September 28, 1897? (2) Had the legislature power to make such a law as to existing corporations? (3) Can appellant demand relief from a contract made with notice of his legal rights. These questions will be disposed of in the order stated.

[The court answered the first question in the affirmative.]

2. It is true that the corporation had no power of itself to implicate its stockholders in a liability which they had declared they would not incur. But their only right to exemption from liability for the debts of the corporation was by virtue of the statute giving it the

power to exempt its stockholders from this liability. This statute the legislature had the right to repeal, not only by virtue of the provision of the constitution above quoted, but by reason of a statutory reservation of this legislative power by the act of 1856, passed long before the enactment of the statute under which the corporation was organized. The stockholders formed the corporation on the conditions held out by the laws of the state. One of these conditions was that the act under which they were created might be amended or altered by the legislature at pleasure, as it might deem necessary. The legislature might, in the first place, have provided that the stockholders should be liable for the corporate debts; and when it provided that they should not be so liable, but reserved the right to alter or amend the law, or to repeal any grant or franchise obtained under it, those who had acted under the statute with full notice of these facts cannot complain that any constitutional right of theirs is violated by the alteration of the law. The rule is thus stated in *Thomp. Corp.* § 3034: "Where the legislature passes a general statute authorizing the organization of corporations, and provides for an exemption from individual liability on the part of their members, and in the statute reserves the right to alter or repeal it, this is a reservation of the power to alter or repeal all or any of the terms, conditions, and rules of liability prescribed in the act; and it is competent for the legislature thereafter to pass an act imposing individual liability upon the members of such corporations, although they were such at the time of the latter act." So, in *2 Cook, Corp.* § 501, it is said: "The best view taken of this reserved power of the state is that under it a fundamental amendment to the charter does not authorize a majority of the stockholders to accept the amendment, and proceed, but that unanimous consent of the stockholders is necessary. Under this reserved power, however, the legislature, it is held, may impose a statutory liability upon stockholders after they have been incorporated, and have gone into a business under a charter which does not impose such liability. The exercise of this power by the legislature in such a case is held to be only a repeal of part of the corporate franchise. So, also, it is said that under this reserved power the legislature may impose a statutory liability for the future debts and obligations of the corporation." This rule has the support of the United States Supreme Court (*Sherman v. Smith*, 1 Black, 587, 17 L. Ed. 163), and is sustained by an overwhelming weight of authority in the state courts. *In re Empire City Bank*, 18 N. Y. 199; *In re Lee's Bank*, 21 N. Y. 9; *In re Reciprocity Bank*, 22 N. Y. 9; *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418; *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585; *Dam Co. v. Gray*, 30 Me. 547; *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335. Nor is the statute liable to constitutional objection because certain classes of corporations, whether organized before or after its enactment, are excepted from the operation of the section imposing a personal liability upon the stockholders. It was

a matter of legislative discretion as to what classes of corporations it was necessary for the security of creditors to include within the statute. It might have made the rule apply only to corporations engaged in banking, or in some mercantile business, as has often been done. It must be necessarily within the discretion of the legislature to make some classification in this matter, and the court will never disturb its judgment unless it is manifestly arbitrary and unjust. This is not the case with the statute before us.

3. The remaining question is: Is appellant entitled to a dissolution of the corporation, or to terminate his connection with it, in order to avoid liability for the corporate debts after September 28, 1897? If he has this right, then the holder of one share of stock in all of these corporations created before the act of April 5, 1893, had the same right. Such a result was certainly not contemplated. A large part of the business of the state was then done by such corporations, and such a construction of the statute at the time would have brought about countless confusion and litigation paralyzing the prosperity of the state. In organizing this corporation, the stockholders in effect agreed that the corporation might affect their individual interest to the extent of the authority conferred upon it, and that this authority might be altered or changed by the legislature. The disability of the corporation to bind the stockholders beyond the amount of the stock, like any other power conferred upon it, might be changed by the legislature, and we see no reason for applying to it a different rule than to other important changes in the corporate authority. True, the legislature could not force upon the corporation the amended grant. If it did not see fit to go on with the business under the new law, it might quit. But this right to dissolve is vested in the corporation, and not in the minority of the stockholders. And if a minority of the stockholders would have no right to a dissolution for other material changes in the law, they have no more right to demand it on account of the change in legislative policy as to the liability of the stockholders; because their exemption from this liability was solely by virtue of the provision of the statute under which they organized, and they knew, when they organized, that this provision, like any of the others contained in the statute, was subject to alteration or repeal by the legislature. By the charter of this corporation it is provided that it is to continue for 25 years, unless sooner dissolved by vote of a majority on value of the stockholders. Though it is a hardship on appellant for the corporation to continue in business, thus making him liable individually for its debts beyond the amount of his stock, — a thing not contemplated by him, in fact, when he went into it, — still all the stockholders, in making that arrangement, must be deemed to have acted with knowledge that the legislature might, in its discretion, take away the privilege of enjoying dividends without personal liability to the creditors of the concern if the enterprise was unsuccessful. This was a privi-

lege not enjoyed by persons in general, and, when the legislature has made them responsible individually to the extent of the amount of their stock, they still stand on a much more favored footing than individuals or partnerships carrying on the same business. While a hardship may be suffered by appellant, and unexpected loss imposed upon him, still it must be remembered that a greater loss might be imposed upon his associates if they were required now to dissolve and wind up the concern. By their charter they acquired the right to continue the business for 25 years under it, subject to such changes as the legislature might see fit to make, and this contract right of theirs is as sacred as any other contract right. The court cannot take it from them while they insist upon exercising it, for to do this might be, after valuable interests had vested in the enterprise, to deny them the benefit of a contract fairly made by all the parties, with notice that the very thing might happen which is now alleged as the basis of relief in this action. We are therefore of opinion that the petition stated no cause of action, and that the court below properly sustained a demurrer to it. Judgment affirmed.

PAYNTER and GUFFY, JJ., dissent.¹

¹ The charter of a railroad corporation gives general power to consolidate with, purchase, or lease other roads. There is a provision that the charter may be amended by any subsequent legislature, in any manner not destroying or impairing the vested rights of said corporation. While the power to consolidate, etc., remains unexecuted, the legislature passes a general statute prohibiting the consolidation, etc., of parallel or competing lines. *Held*, that the latter statute prohibits the subsequent exercise of the power, given by the charter, to consolidate with parallel or competing lines. *Pearsall v. Great Northern R.*, A. D. 1896, 161 U. S. 646.

At the same term, a similar result was reached in a case differing from the former (*inter alia*) in the fact that there was no reserved right to amend the charter. The decision in the latter case was rested upon the police power. *Louisville & Nashville R. R. v. Kentucky*, A. D. 1896, 161 U. S. 677. — ED.

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